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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 296

UNITED STATES NAVIGATION COMPANY, INC.,
PETITIONER,

vs.

THE CUNARD STEAMSHIP COMPANY, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. —

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff,

against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM Navigation Company, Ltd., Furness Withy & Company, Ltd., Atlantic Transport Company, Ltd., Anchor Line (Henderson Bros.), Ltd., Briston City Line of Steamers, Ltd., Canadian Pacific Steamships, Ltd., Donaldson Bros., Ltd., Ellerman's Wilson Line, Ltd., G. Heyn & Sons, Ltd., F. Leyland & Company, Ltd., Manchester Liners, Ltd., Cairn Line of Steamships, Ltd., Franklin A. Ryan and James Sinclair, Defendants

AMENDED BILL OF COMPLAINT—Filed Jan. 13, 1930

United States Navigation Company, Inc., brings this its amended bill of complaint against the above-named defendants, and alleges:

[fol. 5]

Part I

The Plaintiff and Its Services

1. The plaintiff, United States Navigation Company, Inc., is, and at all times mentioned in this complaint has been, a corporation duly organized and existing under and by virtue of the laws of the State of New York; and has had and now has its office for the transaction of its business at 17 Battery Place, New York City, within this District. At all times since May, 1919, the plaintiff has operated steamers for the carriage of general cargo between the port of New York, in the United States, and the ports of London and Liverpool, in Great Britain; and at various times since 1919, between ports of the United States and ports in Germany, Holland, South Africa, South America and Australia.

And, upon information and belief, plaintiff further alleges:

Part II

The Defendants and Their Services

2. The Cunard Steamship Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and has, during substantially all of said period, operated and now operates steamships for the carriage of general cargo between the port of New York, in the United States, and the ports of London, Southampton and Liver- [fol. 6] pool, in Great Britain; between the ports of Philadelphia, Baltimore, Norfolk, Newport News and Boston, in the United States, and the ports of London and Avonmouth, in Great Britain; and between the port of Montreal, in Canada, and the ports of London, Liverpool and Avonmouth, in Great Britain, and Belfast in Ireland.

3. Oceanic Steam Navigation Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the port of New York, in the United States, and the ports of Liverpool, Southampton and Manchester, in Great Britain; and between the ports of Montreal, Quebec and Halifax in Canada, and the ports of London, Southampton, Liverpool, Glasgow, Avonmouth, Swansea and Cardiff, in Great Britain, and Belfast in Ireland.

4. Furness, Withy & Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates a line of steamships for the carriage of general cargo between the port of New York, in the [fol. 7] United States, and the port of London, in Great Britain; between the ports of Boston, Philadelphia, Baltimore, Norfolk and Newport News, in the United States, and the ports of London, Liverpool, Manchester and Dundee, in Great Britain; and between the ports of Montreal

and Halifax, in Canada, and the ports of London, Liverpool, Hull and Manchester and Dundee in Great Britain.

5. Atlantic Transport Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of New York, Baltimore, Norfolk and Newport News, in the United States, and the port of London, in Great Britain; and between the ports of Montreal and Halifax, in Canada, and the ports of London, Avonmouth and Southampton, in Great Britain.

6. Anchor Line (Henderson Bros.), Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates a line of steamships for the carriage of general cargo between the port of New York, in the United States, and the port of Glasgow, in Great Britain.

[fol. 8] 7. Bristol City Line of Steamers, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of New York, Philadelphia and Norfolk, in the United States, and Bristol Channel ports, principally the ports of Cardiff and Bristol, in Great Britain.

8. Canadian Pacific Steamships, Inc., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Irelad, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of Montreal and Quebec, in Canada, and the ports of Liverpool, London, Glasgow and Southampton, in Great Britain.

9. Donaldson Brothers, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates a line of steamships for the carriage of general cargo between the port of Montreal and Halifax, in Canada, and the ports of Liverpool, Cardiff, Swansea, Glasgow [fol. 9] and Avonmouth, in Great Britain, and Belfast in Ireland.

10. Ellerman's Wilson Line, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of New York and Boston, in the United States, and the ports of Hull, Newcastle and Aberdeen, in Great Britain.

11. G. Heyn & Sons, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the port of Montreal, in Canada, and the ports of Belfast, Dublin, Londonderry and Cork, in Ireland.

12. F. Leyland & Company, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the ports of Boston, Philadelphia, Baltimore, Nor- [fol. 10] folk and Newport News, in the United States, and the ports of Liverpool, London and Manchester, in Great Britain.

13. Manchester Liners, Ltd., is, and has been at all times mentioned in this complaint, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now

operates steamships for the carriage of general cargo between the port of Montreal, in Canada, and the port of Manchester, in Great Britain.

14. Cairn Line of Steamships, Ltd., is, and at all times mentioned in this complaint has been, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Northern Ireland, and during substantially all of said period has operated and now operates steamships for the carriage of general cargo between the port of Montreal, in Canada, and the ports of Newcastle, Leith and Dundee in Great Britain.

15. Each of said defendants mentioned in paragraphs 2 to 14, inclusive, of this Part II hereof, is represented in the Southern District of New York by an agent or agents having offices in the Borough of Manhattan, City and County of New York, within said District. The said agents of each of said defendants are duly empowered to and do solicit business, enter into contracts, determine important questions of general policy and rates, and perform the cus- [fol. 11] tomary functions of general steamship agents for and on behalf of each of said defendants within this District. Each of said defendants is engaged in transacting business within this District.

16. Franklin A. Ryan is a citizen and resident of the State of New Jersey.

17. James Sinclair is a citizen of the State of New York and resides in the Southern District of New York.

Part III

The Trade Affected, the Unlawful Combination, and the Practices Employed

18. At all times since 1925 the defendant James Sinclair, and at all times since 1924 the other defendants named in Part II hereof, and from time to time divers other corporations and persons, have been, and now are, engaged in a combination and conspiracy the purpose and object of which is the restraint of certain foreign trade and commerce of the United States, to wit, the carriage of general cargo by steamship from North Atlantic ports in the United States

to Great Britain and Ireland, and in an attempt to monopolize such trade and commerce.

19. More than 95% of said trade and commerce is carried by vessels of the carrier corporate defendants and said divers other carrier corporations engaged with them in said combination, conspiracy and attempt to monopolize, all of [fol. 12] which carriers will be hereinafter collectively referred to as "the combined lines."

20. The plaintiff and the said combined lines are now the only carriers maintaining regular services in said trade, in which the defendants have the advantages of the far greater number and larger size of their vessels, more frequent sailings, and far wider diversity of ports of arrival and departure. Tramp steamers, berthed for particular voyages, ordinarily carrying bulk cargoes only, participate in said trade at irregular intervals and carry a negligible portion only of said total general cargo traffic.

21. During the year 1928, the vessels operated in said trade by the combined lines made upwards of 1,000 sailings from Norfolk, Newport News, Baltimore, Philadelphia, New York, Boston and Portland, Me., ports in the United States, to Aberdeen, Avonmouth, Belfast, Bristol, Cardiff, Cork, Dublin, Dundee, Glasgow, Hull, Leith, Liverpool, London, Londonderry, Manchester, Newcastle and Southampton, ports in Great Britain and Ireland, throughout the year. Certain of the defendant steamship companies also maintained services from the ports of Montreal, Quebec, St. John, N. B., and Halifax, in Canada, to said ports in Great Britain and Ireland. During the same year, the vessels operated by the plaintiff in said trade made a total of 22 sailings from ports in the United States to ports in Great Britain throughout the year—all said sailings being from New York to London and Liverpool.

[fol. 13] 22. But for the combination, conspiracy and attempt aforesaid, each shipper in said trade would be free to select for a particular shipment, or series of shipments, the facilities of the particular carrier which best suited his requirements, taking into consideration the character of the services, dates and ports of departure and destination, and rates charged. There is a considerable diversity in the character of the service afforded in said trade by the various

vessels of the various defendants and the plaintiff, and in the times of departure and arrival, and ports of departure and destination. A shipper in said trade, by reason of the diversity in his requirements as to facilitate, and time, and ports of departure and arrival, often finds it desirable to send one portion of his shipments by one carrier and other portions by other carriers. In the absence of such conspiracy, combination and attempt, while the plaintiff would have to stand on what it could offer in these respects in securing the patronage of the shipping public in said trade, and while the plaintiff would, as to each shipper and each shipment, have to face the competition of each of the other lines, the plaintiff would not have to face, and the individual defendants could not invoke against it, the power of the combined economic resources of all of the combined lines acting in concert and combination.

23. It has at all said times been, and now is, the purpose and object of said combination and conspiracy and attempt, to drive out of and exclude from participation in said trade [fol. 14] and commerce, and eliminate from competition in said trade and commerce, the plaintiff and all other persons not party to said combination, conspiracy and attempt to monopolize, and to prevent entry into participation in said trade and commerce of any person not now engaged therein and to adopt such means and methods and practices as should from time to time, seem appropriate and effective under the circumstances then existing to accomplish said purposes of said combination, conspiracy and attempt to monopolize. As means to effect the purposes of said combination, conspiracy and attempt to monopolize, it has at all said times been and now is a part of the plan and purpose of said combination, conspiracy and attempt to monopolize, and of said defendants so engaged therein, to make use of, and said defendants have agreed to make use of, and pursuant to said agreement, have used, are now using, and unless restrained by this Court, will continue to make use of the following practices to the injury of the plaintiff:

A. Coercion of Shippers by Joint Exclusive Contracts into Refraining from Shipping by Vessels of the Plaintiff

24. For the purpose of coercing shippers, who otherwise would, from time to time, ship in said trade and commerce

by the vessels of the plaintiff, to discontinue and refrain from making such shipments by the vessels of the plaintiff, and for the purpose of forcing the plaintiff out of said trade and commerce, the combined lines, from time to time, put [fol. 15] into effect a system of jointly fixing two schedules of rates—a "contract rate" and a far higher "general tariff rate"—for the carriage, from the North Atlantic ports of the United States and Canada to the various ports in Great Britain and Ireland reached by their services, of divers commodities which have been and are carried, or suited to be carried, by the plaintiff from the United States to Great Britain in said trade. Under the terms of a joint understanding and agreement, the combined lines jointly refuse to carry shipments at said contract rate and require the shippers to pay said far higher general tariff rate, unless such shippers enter into joint exclusive contracts to offer for transportation all of their shipments of such commodities in said trade made or controlled directly or indirectly by them, their agents and/or subsidiaries, to said combined lines or one or more of them, and so to refrain from offering to the plaintiff any of their shipments of such commodities in said trade. Unless such shippers enter into such contracts with the combined lines, they are thus forced to pay the far higher general tariff rate on all shipments of such commodities made in said trade by vessels of the combined lines. The charging of such far lower rate under such joint exclusive contracts is not, and is not intended to be, conditioned upon the volume of traffic offered by the shipper, the number of shipments made or the regularity with which shipments are made; nor is the spread of the differential between such joint exclusive contract rate and such far higher general tariff rate in any way predicated [fol. 16] upon the volume of traffic or the frequency or regularity of shipment, such differential being purely arbitrary and wholly disproportionate to any difference in service rendered, and being determined solely by a consideration of what differential will be effective in coercing a shipper to agree to refrain from making shipments in said trade from the United States to Great Britain by the vessels of the plaintiff.

25. Thus, the average differential between the general tariff and joint exclusive contract rates for the year 1928

on 144 commodities, and for the year 1929 on 134 commodities, carried in said trade by the combined lines under such joint exclusive contracts, was upward of 40% of the contract rate on the same commodities, the tariff rate in numerous instances being as much as 100%, and in one instance 163% higher than the contract rate. The disproportionately wide spread of these differentials was wholly arbitrary and unreasonable. It did not and was not intended reasonably to reflect the difference in cost between securing, handling or carrying the shipments under said exclusive contracts and under separate contracts for each shipment, the purpose of the defendants being to coerce shippers of such commodities in said trade by means of these exorbitant differentials to enter into said exclusive contracts with the combined lines, which contracts required them to refrain from making shipments of such commodities by vessels of the plaintiff. The test used in fixing these dif- [fol. 17] ferentials was the consideration of what spread was regarded as necessary to coerce shippers into refraining from making any shipments whatever of said commodities in said trade by the vessels of the plaintiff.

26. It is intended to be, and is, the result of such practice that shippers, though preferring to use the services of the plaintiff in making shipments in said trade from a port of the United States to a particular port in Great Britain served by the plaintiff, are coerced into refraining from shipping by the vessels of the plaintiff and are coerced into entering into such joint exclusive contracts with the combined lines and into making such shipments of commodities covered by such contracts by the vessels of one or more of them, by reason of the fact that the only service to divers other ports in Great Britain and Ireland to which such shippers desire to ship such commodities is rendered exclusively by some one or more of the combined lines and unless they enter into such contracts the shippers would otherwise be compelled to ship such commodities to such other ports at the disproportionately higher general tariff rates charged by the combined lines.

27. It is also intended to be, and is, the result of such practice that even where the only service from the North Atlantic ports of the United States or Canada to a particular port in Great Britain or Ireland is furnished by some

one or more of the combined lines, such line or lines being [fol. 18] therefore assured of all shipments of commodities covered by such contracts moving from such ports in the United States or Canada to that port, nevertheless, such line or lines will refuse to carry such cargo to that port except at the disproportionately higher general tariff rate, unless the shipper agrees by such joint exclusive contract to offer to some other or others of the combined lines all of its shipments of such commodities to other ports in Great Britain and Ireland, to which the particular line or lines may maintain no service whatever, and unless the shippers refrain from making any shipments whatever of such commodities by the vessels of the plaintiff to such other ports.

28. It is also intended to be, and is, the result of such practice that many shippers are coerced into making such joint exclusive contracts and refraining from availing themselves of the facilities of the plaintiff, which such shippers would otherwise prefer to use for a part of their shipments of the commodities covered by such contracts, because (1) their shipments of such commodities are so large or so frequent or of such a nature that even as to those ports to which the plaintiff maintains a service it is necessary for such shippers to avail themselves of the services of one or more of the combined lines; and (2) unless such shippers enter into such joint exclusive contracts they cannot ship such commodities in said trade by vessels of the combined lines except at the disproportionately higher general tariff rates charged those who will not agree to refrain from [fol. 19] offering any of their shipments of such commodities in said trade to the plaintiff.

29. By means of such practice, the defendants, instead of each separately competing with the plaintiff, have combined, and are conspiring and agreeing to combine, the economic power and resources of all the combined lines to coerce shippers to abandon or refrain from using the services of the plaintiff, and to crush out the competition of the plaintiff and exclude it entirely from said trade and commerce of the United States with Great Britain, to the end and with the result that shippers who otherwise would and could, advantageously to themselves and to the foreign trade and commerce of the United States, make shipments by vessels of the plaintiff are prevented from making any such shipments whatever.

B. Device of Raising Tariff Rates

30. The combined lines, from time to time, during the closing months of a particular year, or at or about the period for the expiration of the joint exclusive contracts described in Section A of this Part III hereof, raise, or threaten to raise, the general tariff rates applicable to commodities covered by such exclusive contracts, without raising the exclusive contract rate on such commodities, for the purpose of coercing shippers who would otherwise ship such commodities in said trade and commerce by vessels of the plaintiff into renewing or entering into such joint exclusive con- [fol. 20] tracts by the fear that such disproportionately high general tariff rates may be kept in force throughout the following year.

C. Disregard of Orders of Purchasers

31. The combined lines, from time to time, have coerced, and threaten further to coerce, shippers who have been instructed by purchasers that shipments in said trade be made to ports in Great Britain from ports in the United States by vessels of the plaintiff, where the sale is f. o. b. an American port, to disregard orders of such purchasers or to secure a change of instructions by such purchasers by threatening to refuse to continue to give to such shippers on their own shipments in such trade the preferential rate provided for in their joint exclusive contracts, such as are described in Section A of this Part III hereof. This practice is followed by the combined lines even though such goods when so shipped from the American ports are legally the property of such purchasers by the terms of an f. o. b. sale, and such purchasers are the actual shippers thereof and pay the freight thereon, and the vendors have no further interest therein.

D. Inducing Cancellation of Contracts with Plaintiff

32. The combined lines, by the use of their economic power resulting from the extent of their combined resources and [fol. 21] from the fact that their combined services run to all ports of Great Britain and Ireland, from time to time have coerced, and threaten further to coerce, shippers into canceling existing contracts with the plaintiff for the carriage of general cargo in said trade from ports in the

United States to ports in Great Britain, and to replace such contracts with joint exclusive contracts with the combined lines.

E. Rebates

33. The combined lines induce shippers, who are using the services of the plaintiff to carry part of their shipments from the United States to Great Britain in said trade, to enter into such joint exclusive contracts as have been described in Section A of this Part III hereof, by rebating to the shipper the difference between the tariff rate which it has actually theretofore paid on such of its goods as it has shipped by the vessels of the combined lines during a certain past period and the rate which the shipper would have paid if it had been under such a joint exclusive contract with the combined lines during that period.

F. False Statements as to the Plaintiff

34. The defendants induce and attempt to induce shippers to discontinue shipments to Great Britain by the vessels of the plaintiff in said trade, by spreading false rumors and making defamatory and derogatory statements with respect to the plaintiff, and falsely stating that the plaintiff [fol. 22] is about to discontinue its services, and that shippers, relying upon such service, if they do not sign such exclusive contracts as are described in Section A of this Part III hereof, will be at a disadvantage by being then unable to secure said contract rate from the combined lines; and induce and attempt to induce shippers to sign such exclusive contracts with the combined lines by falsely representing that rival shippers have signed similar contracts when such rival shippers have not in fact done so.

G. Coercive Use of Patronage

35. The combined lines, by reason of the overwhelming proportion of the vessels which they own or control in said trade, and the large numbers of persons carried thereon as passengers and crews, have occasion to purchase large quantities of provisions, fuel and other supplies for use on their said vessels, and the defendants make use of their combined economic bargaining power to coerce the various producers of such commodities who also make shipments in

said trade to each enter into joint exclusive contracts with the combined lines as to said shipments, such as are described in Section A of its Part III hereof, by threatening each of such producers that unless such producer enters into said joint exclusive contracts with the combined lines, they will not purchase any of said provisions, fuel and other supplies from such producer for use on their vessels.

[fol. 23] H. Coercion Applied to Shipments to Ports Outside of Great Britain and Ireland

36. The defendants induce and attempt to induce shippers of the United States to cease shipping by vessels of the plaintiff to ports on the Continent of Europe not covered by such joint exclusive contracts, by threatening to refuse to give or continue such joint exclusive contracts on shipments made by such shippers by the vessels of the combined lines to Great Britain and Ireland.

I. Threats to Blacklist Forwarders

37. The defendants coerce and attempt to coerce forwarders by threatening to blacklist such forwarders and to refuse to pay them the usual brokerage fees for shipments made by the vessels of the combined lines, unless they discontinue making or advising shippers to make shipments from the United States to Great Britain in said trade by ships of the plaintiff.

Part IV

Overt Acts

38. Pursuant to, and in furtherance of the aforesaid combination and conspiracy in restraint of the foreign trade and commerce of the United States with Great Britain and Ireland, and the attempt to monopolize said trade and commerce, the defendants have committed, among others, the following overt acts:

[fol. 24] A. Coercion of Oil Stove Shippers

39. During the year 1924, for the purpose of depriving the plaintiff of the substantial share of the carriage of oil stoves from the port of New York, in the United States, to

the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined lines agreed among themselves to adopt, and did adopt, a certain contract rate to become effective during the year 1925, to-wit, 20 cents per cubic foot, for the carriage of oil stoves by the vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services. At the same time, the combined lines agreed to adopt, and did adopt, a certain arbitrary and disproportionately higher general tariff rate to become effective during the year 1925, to-wit, 40 cents per cubic foot, for the carriage of such shipments. At the same time the combined lines agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rate on all such [fol. 25] shipments in said trade made by vessels of the combined lines.

40. Since the said year 1924, the combined lines have continued the practice of using said exclusive contracts for the carriage of oil stoves in said trade, and have continued to employ disproportionately wide differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1925, 100%; 1926, 100%; 1927, 100%; 1928, 122%; and 1929, 122%.

41. The defendants, by their combined economic power, exerted through said exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from all or part of that share of said trade and commerce in oil stoves which it had enjoyed prior to the year 1925, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

B. Coercion of Shippers of Oils, Grease and Wax

42. During the year 1924, for the purpose of depriving the plaintiff of the substantial share of the carriage of lubricating oils, grease and wax from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined [fol. 26] lines agreed among themselves to adopt, and did adopt, certain contract rates to become effective during the year 1925, to wit, $1.20 per barrel for the carriage of lubricating oils and 28 cents per hundred pounds for the carriage of grease and wax by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed to adopt, and did adopt, certain arbitrary and disproportionately higher general tariff rates to become effective during the year 1925, to wit, $1.50 per barrel for the carriage of lubricating oils, and 35 cents per hundred pounds for the carriage of grease and wax in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rates unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rates on all such shipments in said trade made by vessels of the combined lines.

43. At all times since the said year 1924, the combined lines have continued the practice of using said exclusive [fol. 27] contracts for the carriage of lubricating oils, grease and wax in said trade, and have continued to employ the same or far wider differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1925, lubricating oils, 25%, grease and wax, 25%; 1926, lubricating oils, 25%, grease and wax, 25%; 1927, lubricating oils, 18%, grease and wax, 18%; 1928, lubricating oils, 33⅓%, grease 36½%, wax, 30%; and 1929,

lubricating oils, 33⅓%, grease, 36½%, and wax, 30%.

44. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in lubricating oils, grease and wax which it had enjoyed prior to the year 1925, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

C. Coercion of Copper Shippers

45. During the year 1925, for the purpose of depriving the plaintiff of the substantial share of the carriage of copper rods, bars and ingots and scrap brass from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, [fol. 28] the combined lines agreed among themselves to adopt, and did adopt, certain contract rates to become effective during the year 1926, to wit, $6.00 per long ton for the carriage of copper rods, $5.50 per long ton for copper bars and ingots, and $5.50 per long ton for the carriage of scrap brass by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed to adopt, and did adopt, certain arbitrary and disproportionately higher general tariff rates to become effective during the year 1926, to wit, $7.00 per long ton for the carriage of copper rods, $6.50 per long ton for the carriage of copper bars and ingots, and $6.50 per long ton for the carriage of scrap brass in said trade. At the same time, the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rates unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher

general tariff rates on all such shipments in said trade made by vessels of the combined lines.

46. At all times since the said year 1925, the combined lines have continued the practice of using said exclusive [fol. 29] contracts for the carriage of copper rods, bars, ingots and scrap brass in said trade, and have continued to employ the same or far wider differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1926, copper rods, 16⅔%, bars and ingots, 18%, scrap brass, 18%; 1927, copper rods, 33%, bars and ingots, 24%, scrap brass, 11%; 1928, copper rods, 47½%, bars and ingots, 37%, scrap brass, 14%; and 1929, copper rods, 37½%, bars and ingots, 24%, scrap brass, 14%.

47. The defendants, by their combined economic power, exerted through said exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in copper rods, bars and ingots and scrap brass which it had enjoyed prior to the year 1926, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

D. Coercion of Lard Shippers

48. During the year 1926, for the purpose of depriving the plaintiff of the substantial share of the carriage of lard from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which [fol. 30] it was then enjoying, the combined lines agreed among themselves to adopt, and did adopt, a certain contract rate to become effective during the year 1927, to wit, 55 cents per hundred pounds for the carriage of lard by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed

to adopt, and did adopt, a certain arbitrary and disproportionately higher general tariff rate to become effective during the year 1927, to wit, 60 cents per hundred pounds for the carriage of such shipments in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rate on all such shipments in said trade made by vessels of the combined lines.

49. At all times since the said year 1926, the combined lines have continued the practice of using said exclusive contracts for the carriage of lard in said trade, and have continued to employ the same or far wider differentials [fol. 31] between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1927, 10%; 1928, 44½%; and 1929, 44½%.

50. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in lard which it had enjoyed prior to the year 1927, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

E. Coercion of Asphalt Shippers

51. During the year 1926, for the purpose of depriving the plaintiff of the substantial share of the carriage of asphalt from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined lines agreed among

themselves to adopt, and did adopt, a certain contract rate, to become effective during the year 1927, to wit, $6.00 per ton for the carriage of asphalt by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed to adopt, and did adopt, a certain [fol. 32] arbitrary and disproportionately higher general tariff rate, to become effective during the year 1927, to wit, $8.96 per ton for the carriage of such shipments in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rate on all such shipments in said trade made by vessels of the combined lines.

52. At all times since the said year 1926, the combined lines have continued the practice of using said exclusive contracts for the carriage of asphalt in said trade, and have continued to employ the same or far wider differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1927, 49%; 1928, 63%; and 1929, 63%.

53. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said [fol. 33] trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in asphalt which it had enjoyed prior to the year 1927, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

F. Coercion of Canned Goods Shippers

54. During the latter part of the year 1926, for the purpose of depriving the plaintiff of the substantial share of the carriage of canned foodstuffs from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined lines agreed among themselves to adopt, and did adopt, a certain contract rate, to become effective during the year 1927, to wit, 55 cents per hundred pounds for the carriage of canned foodstuffs by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time, the combined lines agreed to adopt, and did adopt, a certain arbitrary and disproportionately higher general tariff rate, to become effective during the year 1927, to wit, 60 cents per hundred pounds for the carriage of such shipments in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the com-[fol. 34] bined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general tariff rate on all such shipments in said trade made by vessels of the combined lines.

55. At all times since the said year 1926, the combined lines have continued the practice of using said exclusive contracts for the carriage of canned foodstuffs in said trade, and have continued to employ the same or far wider differentials between the contract and general tariff rates, the differentials for the succeeding years being, respectively, the following percentages of the contract rates: 1928, 30%; and 1929, 30% except that during the years 1928 and 1929 the differential on canned milk was advanced to 44½% of the contract rate.

56. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said

arbitrary differentials, have induced and coerced divers shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from a part of said trade and commerce in canned foodstuffs which it had enjoyed prior to the year 1927, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

[fol. 35] G. Coercion of Agricultural Machinery Shippers

57. During the year 1928, for the purpose of depriving the plaintiff of the substantial share of the carriage of agricultural machinery from the port of New York, in the United States, to the ports of London and Liverpool, in Great Britain, which it was then enjoying, the combined lines agreed among themselves to adopt, and did adopt, a certain contract rate to become effective during the year 1929, to wit, $7.00 per measurement ton for the carriage of agricultural machinery by vessels of the combined lines from those North Atlantic ports in the United States and Canada to those ports in Great Britain and Ireland between which they operated services; and at the same time the combined lines agreed to adopt, and did adopt, a certain arbitrary and disproportionately higher general tariff rate to become effective during the year 1929, to wit, $12.00 per measurement ton for the carriage of such shipments in said trade. At the same time the combined lines further agreed to refuse, and did refuse, to carry such shipments at said contract rate unless the shipper would agree to enter into a joint exclusive contract with the combined lines to offer all such shipments to one or more of said lines, and should refrain from making any such shipments in said trade by the vessels of the plaintiff. At the same time the combined lines further agreed to compel, and did compel, all shippers refusing to enter into such joint exclusive contracts to pay the arbitrary and far higher general [fol. 36] tariff rate on all such shipments in said trade made by vessels of the combined lines.

58. During the year 1929, the combined lines have continued the practice of using said joint exclusive contracts for the carriage of agricultural machinery in said trade, and have continued to employ the same arbitrary differen-

tial of 71% between contract and general tariff rates that was fixed in the year 1928.

59. The defendants, by their combined economic power, exerted through said joint exclusive contracts and said arbitrary differentials, have induced and coerced such shippers to refrain from making any such shipments in said trade by the vessels of the plaintiff, and have excluded the plaintiff from that share of said trade and commerce in agricultural machinery which it had enjoyed prior to the year 1929, and which, but for said acts done pursuant to said conspiracy, combination and attempt to monopolize, it would have continued and would still continue to enjoy.

H. Inducing Cancellation of Swift Contract

60. On December 6, 1926, the firm of Swift & Company, a corporation engaged in the preparation of meat products in the United States, entered into a contract with the plaintiff whereby it agreed to make certain minimum monthly shipments of ordinary stowage cargo by vessels of the plaintiff during the year 1927 to the ports of London [fol. 37] and/or Liverpool in Great Britain. During the month of April, 1927, while said contract was in full force and effect, the defendants induced and coerced said Swift & Company to cancel said contract and to ship and agree to ship all of its products from the United States to Great Britain during the remainder of the year 1927 by vessels of one or more of the combined lines, and to refrain from making any shipments by vessels of the plaintiff.

I. Inducing Cancellation of Wilson Contract

61. On December 6, 1926, the firm of Wilson & Company, a corporation engaged in the preparation of meat products in the United States, entered into a contract with the plaintiff whereby it agreed to make certain minimum monthly shipments of ordinary stowage cargo by vessels of the plaintiff during the year 1927 to the ports of London and/or Liverpool in Great Britain. During the month of April, 1927, while said contract was in full force and effect, the defendants induced and coerced said Wilson & Company to cancel said contract and to ship and agree to ship all of its products from the United States to Great Britain during the remainder of the year 1927 by vessels of one or more

of the combined lines, and to refrain from making any shipments by vessels of the plaintiff.

J. Compelling Disregard of Owners' Shipping Instructions

62. During the year 1928 and at all times thereafter, the defendants induced and compelled Standard Oil Company [fol. 38] of New Jersey and Vacuum Oil Company, corporations engaged in the production of petroleum products in the United States, to disregard instructions to ship purchases by vessels of the plaintiff, given by purchasers who bought from said companies, f. o. b. New York, by refusing to renew contracts at the lower rates with said Standard Oil Company of New Jersey and Vacuum Oil Company for their own shipments in said trade and commerce, and even by refusing to carry out existing contracts with said Standard Oil Company of New Jersey and Vacuum Oil Company for their own shipments in said trade and commerce, if they followed the instructions of said purchasers.

K. Increase in Differentials in October, 1927

63. For the purpose of coercing shippers of certain commodities to make contracts to ship exclusively by the vessels of the combined lines in said trade, said lines during October of the year 1927 adopted the practice of raising the general tariff rates on these particular commodities for the year 1928, without, however, changing the contract rates on these commodities. The purpose of this practice was to bring increased pressure to bear upon shippers of these commodities so that, fearing that such increased differential between the general tariff and contract rates would continue in force throughout the year 1928, they would enter into exclusive contracts with the combined lines and refrain from using the vessels of the plaintiff for their shipments to Great Britain. The general tariff rates on [fol. 39] thirty commodities were thus raised an average of 15½% during the month of October, 1927, to be effective during the year 1928, although the exclusive contract rate on all of these commodities for the year 1928 remained unchanged. This increased differential between the contract and general tariff rates was in no way predicated upon any increased cost of securing or handling the particular traffic involved, but was solely conditioned upon what increase in

the amount of the differential was deemed by the defendants to be necessary in order to coerce shippers to enter into exclusive contracts with the combined lines and refrain from using the vessels of the plaintiff.

L. Increase in Differentials in October, 1928

64. For the purpose of coercing shippers of certain commodities to make contracts to ship exclusively by the vessels of the combined lines in said trade, said lines, during November of the year 1928, adopted the practice of raising the general tariff rates on these particular commodities for the year 1929, without, however, changing the contract rates on these commodities. The purpose of this practice was to bring increased pressure to bear upon shippers of these commodities so that, fearing that such increased differential between the general tariff and contract rates would continue in force throughout the year 1929, they would enter into exclusive contracts with the combined lines and refrain from using the vessels of the plaintiff for their [fol. 40] shipments to Great Britain. The general tariff rates on eleven commodities were thus raised an average of 28% during the month of October, 1928, to be effective during the year 1929, although the exclusive contract rate on all of these commodities for the year 1929 remained unchanged. This increased differential between the contract and general tariff rates was in no way predicated upon any increased cost of securing or handling the particular traffic involved, but was solely conditioned upon what increase in the amount of the differential was deemed by the defendants to be necessary in order to coerce shippers to enter into exclusive contracts with the combined lines and refrain from using the vessels of the plaintiff.

M. Rebate to Swift & Company

65. On or about April 1, 1927, the combined lines, in order to induce Swift & Company to discontinue making shipments by vessels of the plaintiff in said trade and to enter into contracts to ship its products in said trade exclusively by vessels of one or more of the combined lines, agreed to rebate, and thereafter did rebate to said Swift & Company a part of the freight charges theretofore collected by them

from said Swift & Company on shipments theretofore carried by the combined lines for Swift & Company.

N. Rebate to International Harvester Company

66. During November, 1928, the combined lines; in order to induce the International Harvester Company to discon- [fol. 41] tinue shipments in said trade by vessels of the plaintiff and to enter into contracts to ship its products in said trade exclusively by vessels of one or more of the combined lines, agreed to rebate *[and thereafter did rebate] to said International Harvester Company a part of the freight theretofore collected by them from said International Harvester Company on shipments theretofore carried by the combined lines for the International Harvester Company in said trade.

O. Misrepresentations to Libby, McNeil & Libby

67. During November, 1928, in New York City, defendant Sinclair stated to Libby, McNeil & Libby, a corporation engaged in the manufacture of food products in the United States, that H. J. Heinz Company, a rival manufacturer of food products in the United States, had entered into an exclusive contract with the combined lines for the year 1929 covering all of their shipments to Great Britain and Ireland. In fact, as defendant Sinclair well knew, H. J. Heinz Company had not then, and has never since that time, entered into such a contract with the combined lines. The purpose of defendant Sinclair in making such false statement was to cause Libby, McNeil & Libby to believe that their commercial rival, H. J. Heinz Company, had entered into a contract with the combined lines, and thereby to bring pressure upon Libby, McNeil & Libby to enter into a [fol. 42] similar contract and refrain from giving its shipments in said trade to Great Britain to the plaintiff.

P. Misrepresentations as to Discontinuance of Plaintiff's Service

68. During the latter part of the month of November, 1928, defendant Sinclair went to London for the purpose,

* Matter in brackets appeared in bill of complaint before amendment but not in amended bill.

among others, of injuring the business of the plaintiff. On or about the first day of December, 1928, defendant Sinclair attended a meeting of the London Shipping & Forwarding Agent's Conference, which was an organization composed of the leading freight forwarders in London. At this meeting, defendant Sinclair stated that he had come to find out why the forwarders were using the plaintiff's line. Defendant Sinclair further stated falsely that he had the contract of the Hudson-Essex Motors in his pocket, and also the contract for the International Harvester Company, which were both corporations whose products the plaintiff had previously carried in substantial amounts, and that this would mean that the plaintiff would go out of business. On divers other occasions prior to December, 1928, defendant Sinclair made false statements to persons engaged in the shipping trade in London to the effect that the Hudson Motor Car Company had signed an exclusive contract with the combined lines, which meant that the plaintiff had lost the trade of the Hudson Motor Car Company which it had previously enjoyed, with the result that the plaintiff would [fol. 43] have to go out of business. Defendant Sinclair stated to the London & Overseas Shipping Agency that the plaintiff would go out of business in the early months of the year 1929, and that unless the London & Overseas Shipping Agency immediately entered into an exclusive contract with the combined lines for the year 1929 the said lines would, after the plaintiff ceased operations, refuse to negotiate with the London & Overseas Shipping Agency with respect to such a contract until the year 1930, with the result that the London & Overseas Shipping Agency would be forced to utilize the services of the combined lines at the far higher general tariff rates during the entire year 1929.

Q. Coercion of Exclusive Contracts Applied to Shippers in Other Trade

69. On or about January 1, 1929, the combined lines refused to enter into a contract with H. H. Robertson Company, a corporation engaged in the manufacture of roofing materials at Pittsburgh, Pennsylvania, giving said Company the advantage of the contract rate from the United

States to Great Britain and Ireland, unless said Company would agree, as a condition to such contract, that it would not make any shipments to the Port of Hamburg, Germany, by vessels of the plaintiff, and would sign an exclusive contract with a group of steamship companies operating between ports in the United States and ports on the Continent of Europe known as the Continental Conference, of which several of the defendants were members. By this expedient [fol. 44] the defendants thus used the exclusive contract covering shipments to Great Britain and Ireland to coerce H. H. Robertson Company to refrain from using the services of the plaintiff not only to Great Britain but also to a port on the Continent of Europe.

*Part V

Absence of Shipping Board Approval

*A. Failure to File or Obtain Approval

70. Said agreement and understanding constituting said combination, conspiracy and attempt to monopolize, and said agreements and understandings whereby the combined lines have agreed to enter, and have entered, into the said joint exclusive contracts with shippers, as described in Section A of Part III hereof, and said agreements and understandings jointly to perform and adopt such other acts and practices as have been hereinbefore specified in Sections B to I inclusive of said Part III hereof, adopted pursuant to and entered into as means of effecting the purposes of said combination, conspiracy and attempt to monopolize, have never been filed for approval with, or approved by, the United States Shipping Board. All said agreements and understandings referred to in this complaint have been entered into since January 1, 1924. No agreements or understandings of similar character ever have been filed for [fol. 45] approval with, or have been approved by, the Shipping Board, or were in effect at the time of the enactment of the Shipping Act of September 7, 1916.

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* The bill of complaint originally did not contain paragraphs 70-72, inclusive, which were added in the amended bill.

*B. Shipping Board Has Already Held Practices Illegal

71. On or about October 11, 1922, the United States Shipping Board, in a proceeding before it, entitled Eden Mining Co. v. Bluefields Fruit & Steamship Co., 1 U. S. S. B. 41, rendered a decision holding that the practice of a common carrier by water in foreign commerce of granting a contract rate on condition of exclusive shipments, which was lower than the general tariff rate charged those who refused to enter into such exclusive contracts, was discriminatory and illegal under Sections 16 and 17 of the Shipping Act of September 7, 1916, all as more fully set forth in a copy of the said decision set forth as Appendix A hereof, referred to with the same effect as if embodied herein in full.

*C. Agreements Could Not be Approved by Shipping Board

72. Said agreements and understandings are of such terms and character that they could not lawfully be approved by the United States Shipping Board under the provisions of said Shipping Act of September 7, 1916.

[fol. 46] Part VI

Jurisdiction

73. The plaintiff, by reason of said combination, conspiracy and attempt to monopolize and the continued and continuing use by the defendants of said means to effectuate said combination, conspiracy and attempt to monopolize, in violation of an Act of Congress dated July 2, 1890, entitled "An Act to protect commerce against unlawful restraints and monopolies," is threatened with being deprived of all participation in said trade and commerce and irreparable injury therefrom, for which it has no adequate remedy at law; and the plaintiff is entitled to injunctive relief under Section 16 of an Act of Congress dated October 15, 1914, entitled "An Act to supplement existing

* The bill of complaint originally did not contain paragraphs 70-72, inclusive, which were added in the amended bill.

laws against unlawful restraints and monopolies, and for other purposes."

Part VII

*Prayer for Relief

74. Wherefore, the plaintiff prays that the defendants, their agents, employees and servants, and each of them, be enjoined by this Court from participating further in said [fol. 47] combination, conspiracy and attempt to monopolize, and from performing any act pursuant thereto or in furtherance thereof; and from entering into any similar combination, conspiracy, and attempt to monopolize, and from performing any act pursuant thereto or in furtherance thereof; and the plaintiff prays for such other and further relief as to the Court may seem proper.

Rumsey & Morgan, Solicitors for the Plaintiff. Office and Post Office address: 44 Wall Street, New York City, N. Y.

[fols. 48 & 49] *Duly sworn to by Robert W. Boissevain. Jurat omitted in printing.*

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* Before amendment, the prayer for relief was as follows:

71. Wherefore, the plaintiff prays, that the defendants, their agents, employees and servants, and each of them, be enjoined by this Court from participating further in said combination; conspiracy and attempt to monopolize, and from performing any act pursuant thereto or in furtherance thereof, and particularly from performing, directly or indirectly, any of the following acts to wit: (a) entering jointly into contracts with shippers, under the terms of which the shipper is bound to ship exclusively by the vessels of two or more carriers; (b) raising the general tariff rate on certain commodities in an arbitrary amount where the increased rate is not justified by any increased cost of securing or handling the business but is made for the purpose of bringing increased economic pressure to bear upon shippers to force them to enter into said joint exclusive contracts; (c) coercing shippers to disregard orders of purchasers that goods sold f. o. b. at ports

[fol. 50] APPENDIX A TO AMENDED BILL OF COMPLAINT

Docket No. 15

ELEN MINING COMPANY and TUNKY TRANSPORTATION & POWER COMPANY

v.

BLUEFIELDS FRUIT & STEAMSHIP COMPANY and NEW ORLEANS-BLUEFIELDS FRUIT & TRANSPORTATION COMPANY

Submitted August 16, 1922. Decided October 11, 1922

Exaction of higher rates from complainants than from shippers who had agreed to give the respondent their exclusive patronage subjected complainants to undue and unreasonable prejudice and disadvantage, and constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the shipping act. The unjust discrimination having been removed, and there being no proof of damage, complaint is dismissed.

G. F. Snyder, for the complainants.
John St. Paul, Jr., for the respondents.

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in the United States be shipped by vessels of the plaintiff; (d) inducing shippers to break or cancel contracts with the plaintiff; (e) granting rebates to shippers, directly or indirectly, on freight carried during a past period; (f) making false and derogatory statements to shippers and persons engaged in the shipping trade with regard to the plaintiff and its services; (g) coercing shippers to enter into said joint exclusive contracts by threatening to refuse to purchase provisions, fuel and/or other supplies from them; (h) directly or indirectly inducing or attempting to induce shippers to cease shipping by vessels of the plaintiff to ports outside of Great Britain and Ireland by the use of said joint exclusive contracts; and (i) blacklisting, refusing to pay the usual brokerage to, or treating unfairly in any way, or threatening to blacklist, refuse to pay brokerage to, or treat unfairly in any way, forwarders or brokers who make, or advise shippers to make, shipments from ports in the United States to ports in Great Britain by vessels of the plaintiff; and the plaintiff prays for such other and further relief as to the Court may seem proper.

The proposed report of the examiner, which does not differ, in substance herefrom, was served upon the parties. [fol. 51] No exceptions thereto were filed on behalf of the carriers, but exceptions in respect to the question of reparation were received from the complainants and have been given careful consideration.

The complainants in this case are Delaware corporations engaged in the business of mining and furnishing power and transportation in the Country of Nicaragua, Central America, with headquarters at Philadelphia, Pa. The respondents are corporations organized and existing under the laws of the States of Louisiana and Delaware, respectively, engaged as common carriers of property between ports in the State of Louisiana and ports in Nicaragua, and as such are subject to the provisions of the shipping act of 1916.

The complainants allege that in respect to shipments from New Orleans to Bluefields, Nicaragua, the respondents entered into unfair and unjust discriminatory contracts with certain shippers whereby such shippers received a discount of 40 per cent from the respondent's tariff rates, although noncontract shippers, including the complainants, were accorded a discount of but 25 per cent from said tariff rates, thereby subjecting the complainants to undue disadvantage and unjust discrimination, all in violation of sections 14, 16, and 17 of the shipping act. At the hearing it was stated the alleged unlawful discrimination is no longer practiced by the carriers and that part of the complaint requesting the board to order its discontinuance was withdrawn, thus confining the issue to the propriety of carriers' actions and the right of the complainants to repara- [fol. 52] tion. It is also to be noted that no evidence was presented against the New Orleans-Bluefields Fruit & Transportation Company. A witness for the complainants stated this company was named a party under a misapprehension that the Bluefields Fruit & Steamship Company and another company had been consolidated to form the New Orleans-Bluefields Fruit & Transportation Company. The complaint, therefore, must be considered to relate only to the Bluefields Fruit & Steamship Company.

Supplement No. 1 to Bluefields Fruit & Steamship Company General Merchandise Tariff No. 17, effective May 10, 1919, provides that—

A discount of 25 per cent on tariff rates will be allowed on shipments to Bluefields, and 20 per cent on shipments to Cape Gracias, with the exception of lumber shipments, on which full tariff rates will apply to both points.

A further provision of Supplement No. 1 to this tariff reads:

To contractors contracting subject to the provisions of the laws of the United States a discount of 40 per cent is allowed in lieu of 25 per cent hereinabove set forth on shipments of general merchandise to Bluefields (only), with the exception of lumber, on which 20 per cent will be allowed. [fol. 53] Although this supplement uses the expression "discount of 25 per cent on tariff rates," the facts developed in this case plainly show that in each instance the rate which the carrier held out to the public as its regularly established transportation charge was 75 per cent of the rate quoted in the tariff. In other words, the carrier used this phraseology merely as a method of stating the rate, and it does not appear that any shipper was compelled to pay more than such regularly established rate. The only discount involved in this case, therefore, is the difference between the rates charged the complainants and those charged contract shippers.

According to the record, the consideration moving to the Bluefield Fruit & Steamship Company in respect of the contractual relation referred to in the last quoted tariff provision was to bind the shipper in writing to patronize that carrier exclusively in connection with all freight, goods, or merchandise shipped by him or controlled by him between the port of New Orleans and the carrier's Nicaraguan ports of call. Exclusive patronage contracts were available to all shippers at New Orleans without exception and regardless of the amount of freight or number of shipments which any shipper had to move, the only requirement being that he use the line of the respondent and no other. The evidence shows that such agreements were had by the respondent with many shippers via its line from New Orleans to Bluefields and in addition, with consignees who received shipments at New Orleans on through bills of lading from [fol. 54] European ports. The complainants were invited to enter into such an agreement, but because of a desire to

avail themselves at opportune times of the services of other carriers operating between New Orleans and Nicaraguan ports they refused to become party thereto and were accordingly denied the lower rates enjoyed by contract shippers. It appears that except for one other carrier which operated during a part of the period covered by this complaint, the respondent furnished the only regular service between New Orleans and Bluefields. From October 2, 1919, to December 25, 1919, the complainants made a total of 14 shipments of general merchandise from New Orleans to Bluefields via the respondent's line, in connection with which a discount of 25 per cent from current tariff rates was given. At the same time and in many instances upon the same vessels were carried similar shipments for contract shippers who were accorded a discount of 40 per cent. All of these discounts were deducted from the amount of freight payable on bills rendered three days after sailing date.

On behalf of the Bluefields Fruit & Steamship Company it is contended that the agreements and higher rates attacked in the instant case as unlawfully discriminatory were necessary for the protection of its interests against tramp carriers and requisite for the maintenance of the service rendered by it. Because of the existence of the contracts for exclusive patronage, it is stated, the carrier had knowledge from past transactions as to what shippers would have freight to move and the approximate amount of such freight. [fol. 55] In this way, it is claimed, the respondent was enabled to arrange its schedules and provided necessary tonnage for the conduct of its business.

The facts as shown by the record of this proceeding are analogous to those involved in Menacho et al. v. Ward et al., 27 Fed. 529. In that case injunction was sought to restrain common carriers by water from charging higher rates to shippers who refused to agree to give the defendants their exclusive patronage than to shippers who had so agreed. The question presented for determination, propounded in the words of the court, was, "Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise under like conditions to the same places than they charge to others because the complainants refuse

to patronize the defendants exclusively, while other shippers do not?'' The following language, in part, was used in disposing of this question:

The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these [fol. 56] places. Such discrimination is not only unreasonable, but is odious.

In regard to the contentions of the carriers in that case, the court made the following observation:

The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual, and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutation system, whereby those who furnish him regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively.

The benefits which accrue to a common carrier if it may make lower rates to those who ship by it exclusively are plain, and that such a policy may be advantageous to the carrier which practices it may be granted, but it has long since been recognized that those who conduct a public em- [fol. 57] ployment must forego many methods of obtaining business and holding it which are permissible in private enterprise. In the case quoted from above, the status of the common law with respect to exclusive patronage contracts by common carriers is fairly represented. It pro-

nounces the common-law doctrine that such contracts are lawful only in the event they are made with a view that in return for the lower rate the carrier shall receive from the shipper regular consignments of freight, or a given number of shipments, or a certain quantity of merchandise for transportation. The evidence in the instant case is conclusive that none of these elements was a consideration for the lower rate extended to contract shippers. In the words of witness for the respondent, "The one and only condition was that they confine shipments to our line. * * * Our idea in securing these exclusive contracts was to keep shippers from patronizing other lines." It is manifest, therefore, that regardless of how desirable the giving of lower rates to those shippers who agreed to ship exclusively via its line might be to the respondent from the standpoint of business expediency, such practice was violative of the common law because of the absence of any proper consideration. For another reason, as will hereafter be shown, such practice was also violative of provisions of the Federal shipping act as constituting undue discrimination between shippers. It should be here remarked, however, that we do not decide whether under that act the according of lower rates to those shippers who contract to confine their [fol. 58] shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, number of shipments, or quantity of merchandise furnished for transportation, as in the instant case no such question is presented for determination.

By section 16 of the Federal shipping act of 1916 it is declared unlawful for any common carrier by water directly or indirectly "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Again, by section 17 of that statute it is provided that "No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers."

It is evident that the purpose of Congress in enacting these provisions of the statute was to impose upon com-

mon carriers within the purview thereof the duty of charging uniform rates to all shippers receiving a similar transportation service. The duty of the respondent under these sections was to serve the public impartially and we think the language used in W. U. Tel. Co. v. Call Pub. Co., 181 U. S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: "All individuals have equal rights both in respect to service and charges. Of course such equality of right does not prevent [fol. 59] differences in the modes and kinds of service and different charges based thereon. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service must have some reasonable relation to the amount of difference and can not be so great as to produce an unjust discrimination." From the facts of record in the case before us it is manifest that the transportation service furnished the complainants and contract shippers was in all respects identical.

It is suggested on behalf of the carrier that as the complainants were extended full opportunity to avail themselves of the lower rates by agreeing to the same condition which contract shippers had accepted, they were accorded the substantial equality of treatment contemplated by sections 16 and 17 of the act. This contention, however, is as unconvincing here as when used in support of other kinds of unjust discrimination resulting from unfair conditions imposed by carriers upon shippers. Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect [fol. 60] to patronize in connection with subsequent shipments.

Some reliance is placed by the respondent upon the decision in United States v. Prince Line, Ltd., et al., 220 Fed. 230, holding that in respect to commerce of the United States the practice of a combination of foreign carriers to give deferred rebates to all shippers who patronized their lines exclusively was not an unlawful restraint of trade in viola-

tion of the Sherman Antitrust Act. However, the question there involved was not one of undue discrimination between shippers, with which we are now concerned, but one as to the propriety of carriers combining to prevent competition by other lines. The inapplicability of this decision to the complaint before us is further evident when it is observed that Congress, by the subsequent passage of the shipping act, has inhibited and condemned as unlawful the very practice out of which the case arose. It is likewise to be noted, in connection with the case relied upon by the respondent, that the Supreme Court of the United States declined to affirm the decision there rendered. United States v. Prince Line, Ltd., et al., 242 U. S. 537.

No evidence was adduced relating to any action of the respondent tending to show direct or indirect retaliation against the complainants for patronizing other carriers. Likewise, from the facts of record it is clear that the contracts for exclusive patronage complained of were not to any extent based upon volume of freight offered. That part of the complaint alleging violations by the carrier of [fol. 61] paragraphs 3 and 4 of section 14 of the act is, therefore, without support.

In regard to reparation which the board is requested to award, the record shows that the total amount of freight paid by the Eden Mining Company and the Tunky Transportation & Power Company for the carriage of the 14 shipments relative to which complaint is made was $5,576.08. The difference between this amount and the sum which would have been paid had the complainants been given a discount of 40 per cent similarly as were contract shippers is $1,113.30. The complainants content themselves with showing these facts, taking the position that as this latter amount represents the extent of the unlawful discrimination to which they were subjected, the fact and measure of their damage are thereby established, and that they are entitled to recover such amount as a matter of course under authority of section 22 of the act. No evidence is submitted relative to any expense incurred, loss of profits, or damage of any sort suffered as a result of the wrong of the respondent, the complainants insisting that, under the statute, mere proof of the amount by which the rates charged them exceeds those charged contract shippers

for identical transportation service ipso facto establishes the fact of their injury and the amount of their damage.

We think that to accept the contention of the complainants in this connection would be to read into the statute a meaning which its plain wording does not warrant. Section 22 of the act provides that any person may file with [fol. 62] the board a sworn complaint setting forth any violation thereof, and asking "reparation for the injury, if any, caused thereby." It further provides that in the event certain requirements of the statute are met, the board "may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation." It can not be inferred from the language used that compensation for other than the actual damage incurred is to be granted. It may be that in a case of this character the injury sustained by the complainants because of the unlawful discrimination practiced was greater than the amount of the difference between the rates charged them and preferred shippers, or it may be that it was less. As was said in connection with this subject in a similar case involving reparation under a practically identical statute: "The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of pecuniary loss is a matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience," Pennsylvania Railroad Company v. International Coal Mining Company, 230 U. S. 184.

[fol. 63] While, as in the instant case, the fact of discrimination in violation of provisions of the shipping act may be proved and the board find accordingly, in respect to awarding reparation under section 22 of the act for injury alleged to have been caused by such discrimination, the fact of injury and the exact amount of pecuniary damage must be shown by further and other proof before the board may extend relief. We think it is clear that proof of unlawful discrimination within the meaning of the act,

by showing the charging of different rates from shippers receiving the same service, does not, as a matter of course, establish the fact of injury and the amount of damage to which the complainants may be entitled by way of reparation.

After full consideration of all the facts and evidence of record, the board concludes and decides that the exaction of higher rates from the complainants than from other shippers for like service under the circumstances involved in this case subjected the complainants to undue and unreasonable prejudice and disadvantage, and constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the shipping act. Inasmuch as these violations have been discontinued, and no specific injury to complainants was proved, the complaint is dismissed.

An order will be entered accordingly.

[fol. 64] At a Session of the United States Shipping Board, Held at Its Office, in Washington, D. C., on the 11th Day of October, 1922

Formal Complaint No. 15

Eden Mining Company and Tunky Transportation & Power Company

v.

Bluefields Fruit & Steamship Company and New Orleans-Bluefields Fruit & Transportation Company

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the board having, on the date hereof, made and filed a report containing its conclusions and decision thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed, without prejudice.

By the board.

Clifford W. Smith, Secretary. (Seal.)

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS

Now come all the defendants and move the Court to dismiss the amended bill of complaint herein for the following several reasons:

[fol. 66] 1. Because this Court is without jurisdiction of the subject matter in that agreements between common carriers by water in foreign commerce in respect of competition and co-operative arrangements, etc., etc., and the shipping contracts and transportation rates and practices of such carriers, and the alleged arbitrary and unreasonable rates and practices mentioned in the amended complaint are within the exclusive jurisdiction of the United States Shipping Board under the Shipping Act, 1916, 39 Stat. L. 728, as amended by the Merchant Marine Act, 1920, 41 Stat. L. 988.

2. Because the alleged acts of the defendants as set forth in the amended complaint are claimed to have occurred in respect of matters subject to the jurisdiction, supervision and regulation of the United States Shipping Board, which is authorized by law to afford complete remedy by means of investigation, decision and appropriate order.

3. Because the plaintiff has no right to apply to this Court for an injunction in advance of investigation, decision and order by the United States Shipping Board on the matters alleged in the amended complaint, or in advance of any violation by the defendants of such order as said United States Shipping Board might make pursuant to such investigation.

[fol. 67] 4. Because the amended complaint fails to state facts sufficient to entitle the plaintiff to any of the relief therein demanded.

5. Because the suit lacks equity.

6. Because the amended complaint does not state facts sufficient to show that irreparable loss or damage will be sustained by the plaintiff through any acts of the defendants.

7. Because the amended complaint fails to state facts sufficient to show that the plaintiff has no remedy otherwise than in equity.

Burlingham, Veeder, Fearey, [redacted] & Hupper, Solicitors for Defendants, No. 27 William Street, New York City.

Dated January 11, 1930.

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIRS: Please take notice that defendants' motion to dismiss the amended bill of complaint herein pursuant to motion papers served on January 11, 1930, will be brought [fol. 69] on for argument at a Term of this Court for the hearing of motions to be held in the courtroom in the United States Post Office Building, Borough of Manhattan, City of New York, on January 14, 1930, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, January 13, 1930.

Yours, etc., Burlingham, Veeder, Fearey, Clark & Hupper, Solicitors for Defendants, 27 William Street, Borough of Manhattan, New York City.

To Rumsey & Morgan, Esqs., Solicitors for Plaintiff, 44 Wall Street, New York City.

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION, CAFFEY, D. J., ON DISMISSAL OF AMENDED BILL

If the conclusion reached in my memorandum of December 11, 1929, be correct, then I think the amendment does not strengthen the bill or raise a question essentially differ- [fol. 71] ent from that already dealt with. It does not seem

to me that the position of the complainant is sustained by Mitchell Coal & C. Co., v. Pennsylvania R. Co., 230 U. S. 247, or by Thomsen v. Cayser, 243 U. S. 66, or by Gt. No. Ry. v. Merchants Elev. Co., 259 U. S. 285, or by any other authoritative decision brought to my attention.

Motion to dismiss the amended bill granted.

Francis G. Caffey, U. S. D. J.

Dated Jan. 16, 1930.

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION, CAFFEY, D. J., ON DISMISSAL OF ORIGINAL BILL

1. I should like to prepare a reasoned statement fully discussing the interesting question raised by the motion to dismiss the bill. It is impracticable to do that, however, if [fol. 73] the matter is to be disposed of seasonably. I shall therefore confine myself to a somewhat summary recital of the grounds on which I base the conclusion I have reached.

The sole issue is of statutory interpretation. So far as I can discover, the pertinent sections of the Shipping Act have not yet been judicially construed.

For convenience, common carriers in foreign commerce (subject to the Shipping Act) will be referred to as ocean carriers; the Shipping Board, as the board; common carriers in interstate commerce (subject to the Interstate Commerce Act), as land carriers; and the Interstate Commerce Commission, as the commission.

2. The defendants get no help (save perhaps as indicated in paragraph 9 of this memorandum) from section 15 of the Shipping Act (46 U. S. C. A., sec. 814). The exemption thereby of ocean carriers from proceedings under the Sherman Act relates only to (a) agreements, existing at the time of the organization of the board, which it has not disapproved or (b) agreements, made after the board was organized, which it has approved.

The bill does not allege, and this court by the exercise of judicial notice cannot learn (see Robinson v. Baltimore & O. R. Co., 222 U. S. 506, 511-2; Shipping Act, sec. 24; 46

U. S. C. A., sec. 823), whether any agreement with which we are now concerned comes within either of those classes. If it does, the burden of showing the fact is on the defendants and they must plead it in order to benefit by it (McKelvey [fol. 74] v. United States, 260 U. S. 353, 357).

I have not overlooked the dates mentioned in the bill. So far as appears therein, the earliest time any act complained of occurred was 1924. That, however, has no bearing on the phase of the matter, arising under section 15, considered in this paragraph. As pointed out in paragraph 9 hereof, the bill is silent as to whether the agreements complained of or memoranda of them have ever been filed with the board.

3. Disregarding the Shipping Act for the moment, I think the bill states a cause of action under sections 1 and 2 of the Sherman Act (15 U. S. C. A., secs. 1 and 2), for which section 16 of the Clayton Act (ibid., sec. 26) entitles plaintiff to an injunction.

4. I think also that, despite the fact that the bill does not refer in terms to the Shipping Act, the plaintiff cannot succeed unless it be established that the defendants have violated section 14, 16 or 17, or possibly (in the way explained below) section 15, of that statute (46 U. S. C. A., secs. 812, 814, 815, 816).

The confederacy to restrain and the attempt to monopolize the carriage of general cargo by vessel, which constitute the gravamen of the bill, seem to me necessarily to charge violations of the Shipping Act. The means alleged to have been employed were unreasonably excessive differentials between contract rates and open or tariff rates, [fol. 75] coupled with viciously discriminatory practices in applying the differentials. Shippers, in a variety of ways, were thereby coerced, it is said, to divert general cargoes from the line of the plaintiff to the lines of the defendants. Without a scale of unreasonably high tariff rates or unreasonably low contract rates, the differentials could not have existed as a device.

In the absence of an undue spread between the two classes of rates, certainly the principal items and probably all the items of complaint (embodied in Part III of the bill), which describes the offending by defendants against the Sherman Act relied on, would not and could not exist. If I be right

on this point, then clearly the greater portion, if not all, of the charging part of the bill, though not so labelled, embraces violations of the Shipping Act.

Moreover, even if some of the items in the charging part of the bill do not themselves directly allege violations of the Shipping Act, they at least rest or depend on the premise that, in violation of that Act, there exists and is employed the device of maintaining an undue spread between contract and non-contract rates. The things are so inextricably interrelated and interwoven that if the charge of excessive differentials, with the incidental use made of them in forcing joint exclusive contracts into being, were withdrawn, then the essential elements of stating a cause of action under the Sherman Act would go also; it would disappear, of necessity, by the very act of withdrawing the allegations of conduct violative of the Shipping Act.

[fol. 76] The spread between the two sets of rates could not exist as the foundation of the device or of the practices assailed by the bill unless the tariff rates were unreasonably high or the contract rates were unreasonably low. It seems to me therefore to follow that a large proportion of, and I believe all that is material in, the charging part of the bill consists of or includes offenses against the Shipping Act. In other words, the device of the undue spread is the means by which the coercion complained of is applied, and by which alone it is capable of being applied, and by which the other misconduct complained of occurs and is rendered possible.

As I understand the position of defendants, they in effect concede that what they denominate violations of the Sherman Act also, in every instance, constitute offenses against the Shipping Act. What follows in this memorandum (subject to what is said in paragraph 11) is based on the assumption that Part III of the bill involves only charges which, either directly or incidently, are or depend upon violations of the Shipping Act.

5. It is clear that, disregarding minor immaterial details, the scheme created by the Shipping Act for the regulation of rates and practices of ocean carriers is, in its essential features, the same as that prescribed by the Interstate Commerce Act in the corresponding field for land carriers; also that the functions of the board under one statute are, in sub-

stance, the same as the functions of the commission under [fol. 77] the other statute. It is further indisputable that, as construed by the Supreme Court preceding enactment of the Shipping Act (Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 440-2, and cases following it), land carriers could not be successfully sued in the district court, upon a cause of action identical with that in the instant case, until after resort to and decision by the commission upon the rates and practices assailed.

What the decision in the instant case should be therefore turns upon whether clauses of the Shipping Act now under examination, with regard to ocean carriers, must have the same meaning as that which previous court decisions had attributed to corresponding clauses of the Interstate Commerce Act with respect to land carriers.

6. Sections 14 (a), 17 and 22 of the Shipping Act (46 U. S. C. A., secs. 813, 816, 821) invest the board with jurisdiction, and when invoked require it to exercise jurisdiction, of complaints against rates and practices prohibited by the Act. Section 22 (ibid., sec. 821) confers upon any person the right to complain to the board of any violation of the Act and requires the board to make an order on every complaint. Sections 29 and 30 (ibid., secs. 828-9) grant to any one injured by violation of an order of the board free access to a district court having jurisdiction of the parties for appropriate relief, including injunction.

[fol. 78] 7. It is hence clear that, in substance and certainly in every aspect relevant to the present controversy, the system prescribed by the Shipping Act for the regulation of and remedies against ocean carriers, in regard to rates and practices condemned thereby which must be passed on before plaintiff can recover in this suit, is identical with that prescribed by the Interstate Commerce Act for the regulation of and remedies against land carriers growing out of similar matters condemned by the latter statute. It follows that the Shipping Act should, as applied to the present case, be given the same meaning. It follows also, consistently with the reasoning of the Supreme Court decisions on questions arising under the Interstate Commerce Act, that this court would trespass upon the domain assigned by statute to the board if, in advance of applica-

tion to that body, the bill were allowed to be maintained here.

8. It may be suggested that the express mention of the Sherman Act in section 15 of the Shipping Act is a manifestation of Congressional design to confine the delimitation of proceedings under the Sherman Act to the particular instances of agreements there dealt with. It may be argued that, inasmuch as the bill does not rest on agreements of that character, the Shipping Act does not oust the court of jurisdiction in cases, like the one at bar, where relief was not first sought from the board.

Replies may be made in reverse order. In the first place, it will be noted that section 15 goes far beyond delimita-
[fol. 79] tion. It renders completely lawful, when made by ocean carriers and of the kind described in the section, agreements which if made by others or of a different kind would be within the condemnation of the Sherman Act. In the second place, along with the canon of statutory interpretation invoked, that the expression of one thing excludes all others, stands another canon, equally familiar, that where Congress in a later statute employs words which have been previously judicially construed, it will be presumed that it was the legislative intent to use them with the same meaning in the later statute.

After all, the meaning of a statute is to be ascertained from the language in its entirety and from consideration of the purposes aimed at. The Shipping Act is so nearly identical with the Interstate Commerce Act in the provisions of the former bearing on this case that I cannot escape the feeling that, since within their respective fields the objects of both statutes are precisely the same, these provisions must be given the meaning long previously assigned to them by settled decisions of the Supreme Court in cases which arose, in a variety of circumstances, under the Interstate Commerce Act.

9. Again, it is to be noted that section 15 imposes an obligation, absolute in terms and binding upon all ocean carriers, immediately to file with the board copies of memo-
randa of such agreements as those complained of. Failure to do so is a violation of the Act. Of that violation plaintiff
[fol. 80] is entitled to complain to the board. So also, the

board has power to make orders directing the filing of agreements of this type. It is not stated whether they have been filed or ordered filed. While I adhere to the view, expressed in paragraph 2 above, that defendants must bring into the case facts showing they are entitled to the protection from the Sherman Act provided in the section if they rely on that as a defense, nevertheless it seems to me with respect to violations of section 15, as with respect to violations of other sections of the Shipping Act pertinent to the question here, that the court is required to refrain from permitting itself to be used as a forum for litigation about the agreements until after they have been ordered to be filed or have been acted upon by the board or it has had opportunity to pass upon them in the way contemplated by section 15.

10. It is true that section 16 of the Clayton Act is still in full force. Nevertheless, in the absence of a violation of the Sherman Act, plainly there can be no recovery in the present suit. Inasmuch as a proceeding under the Sherman Act is not open to the plaintiff because, so far as disclosed by the bill, it has not heretofore sought relief from the board, it follows that the Clayton Act standing alone affords no ground for relief. In other words, the foundation for resort to the remedy provided by the Clayton Act disappears along with the failure to show the prerequisite to [fol. 81] maintaining suit for violation of the Sherman Act.

11. There may be instances alleged in the bill, and possibly the giving of rebates described in paragraph 33 is an actual instance, of violating the Shipping Act not so dependent upon the unreasonableness of rates or the discrimination in practice or upon anything else within the primary province of the board as to require findings of fact by the board preceding court proceedings based thereon. If so, however, they do not seem to me to involve such irreparable injury to plaintiff as section 16 of the Clayton Act demands as a condition to injunctive relief. If they exist, the more appropriate remedy is criminal prosecution.

12. What has been said is little more than an indication to counsel of the steps by which I have reached a result. It seems better, however, to issue the memorandum in this form than to postpone announcement of a determination

sufficiently long to enable me to frame an extended opinion—partly because (as I assume), in any event, the case must go to an appellate court and the sooner it is in shape for appeal the better for all concerned.

Motion granted.
Dated, December 11, 1929.

Francis G. Caffey, U. S. D. J.

[fol. 82] IN UNITED STATES DISTRICT COURT

In Equity. 50-162

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff,
against

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., Furness Withy & Company, Ltd., Atlantic Transport Company, Ltd., Anchor Line (Henderson Bros.), Ltd., Bristol City Line of Steamers, Ltd., Canadian Pacific Steamships, Ltd., Donaldson Bros., Ltd., Ellerman's Wilson Line, Ltd., G. Heyn & Sons, Ltd., F. Leyland & Company, Ltd., Manchester Liners, Ltd., Cairn Line of Steamships, Ltd., Franklin A. Ryan and James Sinclair, Defendants

DECREE DISMISSING AMENDED BILL OF COMPLAINT—Jan. 17. 1930

[fol. 83] The defendants having moved on the amended bill of complaint to dismiss the same on the grounds stated in the motion filed herein on January 11th, 1930, which motion duly came on to be heard at this Term and was argued by counsel, and the Court, after due deliberation having rendered its opinion granting said motion,

Now, on motion of Burlingham, Veeder, Fearey, Clark & Hupper, solicitors for the defendants, it is

Ordered, Adjudged and Decreed that the amended bill of complaint herein be, and the same hereby is, dismissed with costs.

Francis G. Caffey, U. S. D. J.

Notice of Settlement waived.
Rumsey & Morgan, Solicitors for Complainant.

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Honorable the Judges of Said Court:

Now comes the plaintiff, United States Navigation Company, Inc., by Rumsey & Morgan, its solicitors, and feeling itself aggrieved by the final decree of this Court entered on [fol. 85] the 18th day of January, 1930, hereby prays that an appeal may be allowed to it from the said decree to the Circuit Court of Appeals for the Second Circuit, and that a transcript of the record of proceedings and papers upon which the said decree and decision were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and in connection with this petition petitioner herewith presents its assignment of errors.

New York, January 30, 1930.

Rumsey & Morgan, Solicitors for Plaintiff. Office and Post Office address: 44 Wall Street, New York, N. Y.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Petition approved and appeal allowed as prayed for. January 31, 1930.

Alfred C. Coxe, U. S. D. J.

[fol. 86] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the above named plaintiff by its attorneys, Rumsey & Morgan, and files the following assignment of

errors, and says that the decree of the District Court for the Southern District of New York, entered in this cause [fol. 87] on January 18, 1930, is erroneous for the following reasons:

1. The court erred in granting defendants' motion to dismiss plaintiff's amended bill of complaint.

2. The court erred in rendering a decree against the plaintiff upon the granting of the defendants' motion to dismiss the amended bill of complaint.

3. The court erred in holding that it did not have jurisdiction to entertain the plaintiff's amended bill of complaint.

4. The court erred in holding that plaintiff's amended bill of complaint did not allege facts entitling the plaintiff to injunctive relief under Section 16 of the Clayton Act, based upon violations of either or both Sections 1 and 2 of the Sherman Act.

5. The court erred in holding that because the acts alleged in the amended complaint were or may have been violations of the Shipping Act, the plaintiff was not entitled to injunctive relief under Section 16 of the Clayton Act, based upon violations of either or both Sections 1 and 2 of the Sherman Act.

6. The court erred in holding that the plaintiff should first have sought relief before the United States Shipping [fol. 88] Board under the provisions of the Shipping Act of 1916, and that the court had no jurisdiction to entertain the amended bill of complaint until the agreements and understandings constituting the combination and conspiracy in restraint of the foreign trade and commerce of the United States and attempt to monopolize said trade and commerce complained of were ordered to be filed with the Shipping Board, or had been acted on by the Board, or until the Board had had an opportunity to pass upon them.

7. The court erred in failing to hold that it had jurisdiction to entertain the amended bill of complaint, without requiring the plaintiff to show prior resort to the United States Shipping Board, by reason of the fact that the United States Shipping Board had already adjudged and

declared the principal means for accomplishing the combination, conspiracy and attempt complained of to be unlawful under the Shipping Act of 1916.

8. The court erred in failing to hold that it had jurisdiction to entertain the amended bill of complaint, without requiring the plaintiff to show prior resort to the United States Shipping Board, by reason of the fact that the agreements and understandings, alleged in the amended bill of complaint as constituting the combination, conspiracy and attempt complained of, were of such a character that they could not be approved and rendered lawful by the United [fol. 89] States Shipping Board except under a construction of the Shipping Act of 1916 which would render the test of illegality under that Act so indefinite as ipso facto to render the Act unconstitutional.

9. The court erred in failing to hold that it had jurisdiction to entertain the amended bill of complaint, without requiring the plaintiff to show prior resort to the United States Shipping Board, by reason of the fact that the amended bill of complaint alleges that the agreements and understandings between the defendants therein set forth as constituting the combination, conspiracy and attempt complained of, were entered into after the date of the passage of the Shipping Act of 1916, and had not been filed with and approved by the United States Shipping Board, whereas under the provisions of the Shipping Act of 1916, such agreements and understandings are expressly declared to be unlawful unless and until they are filed with and approved by the United States Shipping Board.

10. The court erred in failing to hold that it had jurisdiction to entertain the amended bill of complaint without requiring the plaintiff to show prior resort to the United States Shipping Board, by reason of the fact that the plaintiff in its amended bill of complaint does not seek relief under the Shipping Act of 1916, and so no administrative question is presented under that Act for decision [fol. 90] by the United States Shipping Board.

Wherefore, plaintiff prays that the decree of the District Court for the Southern District of New York be reversed, and that the said District Court be directed to

enter an order denying the motion of the defendants to dismiss the plaintiff's amended bill of complaint.

New York, January 30, 1930.

Rumsey & Morgan, Solicitors for Plaintiff. Office and Post Office address: 44 Wall Street, New York, N. Y.

[fols. 91-95] Bond on appeal for $250.00 omitted in printing.

[fols. 96 & 97] Citation, in usual form, omitted in printing.

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated February 1, 1930.

Rumsey & Morgan, Solicitors for Appellant. Burlingham, Veeder, Fearey, Clark & Hupper, Solicitors for Appellees.

[fol. 99] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 100] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1930

No. 5

Argued October 22, 1930. Decided May 18, 1931

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff-Appellant,

v.

THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM Navigation Company, Ltd., Furness Withy & Company, Ltd., Atlantic Transport Company, Ltd., Anchor Line (Henderson Bros.), Ltd., Bristol City Line of Steamers, Ltd., Canadian Pacific Steamships, Ltd., Donaldson Bros., Ltd., Ellerman's Wilson Line, Ltd., G. Heyn & Sons, Ltd., P. Leyland & Company, Ltd., Manchester Liners, Ltd., Cairn Line of Steamships, Ltd., Franklin A. Ryan, and James Sinclair, Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

OPINION

From a decree dismissing the amended bill of complaint plaintiff appeals.

By its amended bill of complaint, the plaintiff, a corporation operating steamships for the carriage of general cargo between the port of New York and ports of London and Liverpool and at times between ports of the United States and ports in Germany, Holland, South America, South Africa, and Australia, alleges that the defendants, which together carry 95 per cent. of the general cargo between North Atlantic ports in the United States and ports of Great Britain and Ireland, entered into a conspiracy in violation of the Sherman Anti-Trust Act (15 U. S. C. A. §§ 1-7, 15) and the Clayton Act (38 Stat. 730) for the purpose of coercing shippers who otherwise would from time to time ship by the vessels of the plaintiff. It alleges that by a joint

agreement among the defendants the latter have put into effect a system fixing two schedules of rates, a "contract rate" and a far higher general tariff rate for the carriage from the North Atlantic ports of the United States and Canada to the various ports in Great Britain and Ireland reached by their service of various commodities; that, under the terms of this agreement, the combined lines jointly refused to carry shipments at the contract rate, and required the shippers to pay a far higher general tariff rate unless such shippers agreed to offer for transportation all of their shipments to the combined lines, or one or more of them, and to refrain from offering to the plaintiff any of their shipments; that, unless these shippers entered into contracts with the combined lines, they were forced to pay the far higher general tariff rate on all shipments of commodities made by vessels of the combined lines; that the charging of the lower rate under such joint exclusive contracts was not conditioned upon the volume of traffic offered by the shipper, the number of shipments made, or the regularity with which such shipments were made, nor was the spread of the differential between such joint exclusive contract rate [fol. 101] and the higher general tariff rate predicated upon the volume of traffic or the frequency or regularity of shipments, but it was determined solely by a consideration of what differential would be effective in coercing a shipper to agree to refrain from making shipments by the vessels of the plaintiff; that the average differential between the general tariff and joint exclusive contract rates for the year 1928 on 144 commodities and for the year 1929 on 134 commodities carried by the combined lines under such joint exclusive contracts was upwards of 40 per cent. of the contract rate on the same commodities, the tariff rate in numerous instances being as much as 100 per cent. and in one instance 163 per cent. higher than the contract rates; that, as a result of such practices, shippers, though preferring to use the service of the plaintiff in making shipments, were coerced into refraining from shipping by the vessels of the plaintiff and into entering into joint exclusive contracts with the combined lines, because of the fact that the only service to divers ports in Great Britain and Ireland to which shippers desired to ship commodities was rendered exclusively by some one or more of the combined lines, and, unless they entered into such contracts, the shippers would be com-

pelled to ship commodities to certain ports at the disproportionately higher general tariff rates charged by the combined lines; that by means of such practice, the defendants, instead of separately competing with the plaintiff, united the economic power and resources of all the combined lines to coerce shippers to abandon or refrain from using the service of the plaintiff and to exclude it entirely from commerce of the United States with Great Britain.

The amended bill further alleges that the combined lines during the closing months of a particular year or at about the period for the expiration of the joint exclusive contracts for the purpose of coercing shippers to deal with them would raise, or threaten to raise the joint tariff rates applicable to commodities covered by the exclusive contract, without raising the exclusive contract rate.

It is further alleged that the combined lines coerced shippers who had been instructed by purchasers to ship by vessels of the plaintiff f. o. b. an American port to secure a change of instructions by threatening to refuse to continue to give such shippers on their own shipments the preferential rates provided in their joint exclusive contracts; also that the combined lines coerced shippers to cancel existing contracts with the plaintiff for the carriage of general cargo in order to replace such contracts with joint exclusive contracts with the combined lines.

It is further alleged that the combined lines induced shippers using the service of the plaintiff to enter into joint exclusive contracts with the defendants by rebating to the shipper the difference between the tariff rate which it had actually theretofore paid on such of its goods as it had shipped by the vessels of the combined lines during a certain past period and the rate which the shipper would have paid if it had been under a joint exclusive contract with the combined lines during that period.

It is further alleged that defendants induced shippers to discontinue shipments by vessels of the plaintiff by spreading false rumors and falsely stating that the plaintiff was about to discontinue its service.

The bill further alleges that the combined lines had occasion to purchase large quantities of provisions, fuel, and other supplies for use on their vessels, and made use of their combined economic bargaining to coerce the various

producers of these commodities, who also make shipments, to enter into joint exclusive contracts with them, by threatening that, unless they did so, the defendants would not purchase any of such provisions from such producers.

It is further alleged that the defendants induced shippers to cease shipping by vessels of the plaintiff to ports on the continent of Europe not covered by joint exclusive contracts, by threatening to refuse to continue joint exclusive contracts on shipments made by the vessels of the combined lines to Great Britain and Ireland; that the defendants coerced forwarders by threatening to blacklist such forwarders and to refuse to pay them the joint brokerage fees for shipments made by the vessels of the combined lines unless they discontinued making or advising shippers to make shipments from the United States to Great Britain in the ships of the plaintiff.

The amended bill set forth that the alleged agreement had been entered into subsequent to 1924, was in violation of the Sherman Anti-Trust Act and the Clayton Act, had not been filed for approval with or approved by the United States Shipping Board, and that the Shipping Board had rendered a decision in another case that the practice of [fol. 102] a common carrier by water of granting a contract rate on condition of exclusive shipments, which was lower than the general tariff rate charged those who refused to enter into exclusive contracts, was discriminatory and illegal under the Shipping Act of September 7, 1916 (39 Stat. 735 [46 U. S. C. A. § 812]). The bill also set forth in general that the alleged illegal acts were not only done but threatened. The prayer was to enjoin the defendants from continuance of the conspiracy.

A motion was made to dismiss the amended bill because the matters were within the exclusive jurisdiction of the United States Shipping Board and for other reasons. The District Court granted the motion and dismissed the suit.

Rumsey & Morgan, of New York City (Mark W. Maclay and John Tilney Carpenter, both of New York City, of counsel), for appellant.

Burlingham, Veeder, Fearey, Clark & Hupper, of New York City (Roscoe H. Hupper and Burton H. White, both of New York City, of counsel), for appellees.

AUGUSTUS N. HAND, Circuit Judge (after stating the facts as above):

The agreement set forth in the amended bill of complaint involves a violation of the Sherman Anti-Trust Act, 15 U. S. C. A. §§ 1-7, 15 (United States v. Pacific & Arctic Co., 228 U. S. 87, 33 S. Ct. 443, 57 L. Ed. 742; Thomsen v. Cayser, 243 U. S. 66, 37 S. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322), at least in the absence of approval by the United States Shipping Board pursuant to section 15 of the Shipping Act (46 U. S. C. A. § 814). That section provides that "all agreements * * * made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement. * * * Every agreement * * * lawful under this section shall be excepted from" the Sherman Act and acts supplementary thereto.

As the amended bill alleges that the agreement declared upon has not been approved by the Shipping Board, the exception of section 15, supra, does not apply. From this the plaintiff reasons that an injunction may be properly sought under section 16 of the Clayton Act (15 U. S. C. A. § 26), which permits "injunctive relief" to private parties "against threatened loss or damage by a violation of the anti-trust laws."

Prior to the enactment of the Clayton Act in 1914, private parties were not entitled to sue to restrain violations of the anti-trust laws embodied in the Sherman Act, though injunctive remedies were given to the government. Minnesota v. Northern Securities Co., 194 U. S. 48, 24 S. Ct. 598, 48 L. Ed. 870; Paine Lumber Co. v. Neal, 244 U. S. 459, 37 S. Ct. 718, 61 L. Ed. 1256.

The Clayton Act (section 16 [15 U. S. C. A. § 26]) provides that no person except the United States shall be entitled "to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce * * * in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." The Supreme Court has held that, while a combination of land carriers to fix rates may be illegal under the Anti-Trust Acts and may

be prosecuted by the United States, private shippers who claim to be injured must seek their remedies against such a combination under the Interstate Commerce Act (49 U. S. C. A. § 1 et seq.) (Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075), and cannot even sue at law to recover damages under section 7 of the Sherman Act (15 U. S. C. A. § 15). Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183. The court below, per Caffey, J., applied similar reasoning to the combination of water carriers involved in the case at bar and dismissed the amended bill on the ground that relief must be sought under the Shipping Act.

It is said, however, that the Clayton Act contains no exception, affecting carriers by water, similar to the provision of section 16 of that act (46 U. S. C. A. § 815), which precludes private parties from bringing suits for injunctive relief against land carriers in respect to matters subject to the regulation of the Interstate Commerce Commission; and it is therefore insisted that the general provisions of the Clayton Act permitting injunctive relief to private parties "against threatened loss or damage by a violation of the antitrust laws" should have unrestricted application to the case at bar.

[fol. 103] But, in spite of the provision in the Interstate Commerce Act that nothing contained therein "shall in any way abridge or alter the remedies * * * existing at common law or by statute" and that its provisions "are in addition to such remedies" (49 U. S. C. A. §22), the Supreme Court has been increasingly disposed to treat the remedies afforded by that act as exclusive. Private parties have not been permitted to pursue remedies under the Sherman or Clayton Acts in cases where the Interstate Commerce Act has afforded relief. Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183.

It is said that remedies afforded by the Interstate Commerce Act have been held exclusive only where administrative questions have been involved. But the tendency to extend the requirement of a preliminary inquiry by the Commission is significant.

In the pioneer case of Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, it was held that the right of a shipper to recover a rate alleged to be discriminatory must first be submitted

to the Interstate Commerce Commission. Robinson v. Balt. & Ohio R. R., 222 U. S. 506, 32 S. Ct. 114, 56 L. Ed. 288, and Mitchell Coal Company v. Penna. R. R. Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472; were to the same effect. In Balt. & Ohio R. R. v. Pitcairn Coal Co., 215 U. S. 481, 30 S. Ct. 164, 54 L. Ed. 292, Morrisdale Coal Co. v. Penna. R. R., 230 U. S. 304, 33 S. Ct. 938, 57 L. Ed. 1494, and Midland Valley R. R. v. Barkley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664, the question involved was whether a distribution of coal cars to shippers was discriminatory. It was held that the matter involved preliminary action by the Interstate Commerce Commission, in the absence of which the federal courts had no jurisdiction. Similarly in Tex. & Pac. Ry. Co. v. American Tie Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255, the question whether a tariff established by the Commission covered a certain product was held to require the preliminary determination of the Commission. In Northern Pac. Ry. Co. v. Solum, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221, the reasonableness of a practice of routing shipments was held to involve preliminary administrative determination. In Western & Atlantic v. Public Service Comm., 267 U. S. 493, 45 S. Ct. 409, 69 L. Ed. 753, a bill which was filed to enjoin a state commission from enforcing an order directing a railroad to maintain service on an industrial switch track was dismissed because the question was one which must first be presented to the Interstate Commerce Commission. In Board v. Great Northern Ry., 281 U. S. 412, 50 S. Ct. 391, 74 L. Ed. 936, it was held that the question whether intrastate railroad rates ordered by state authority should be set aside as working unreasonable discrimination against interstate commerce must be determined in the first instance by the Interstate Commerce Commission, and a suit to enjoin a state commission from enforcing an order as to such rates was dismissed.

In the following situations suits were allowed without preliminary resort to the Interstate Commerce Commission because pure questions of law were thought to be involved: In Pennsylvania R. R. v. Sonman Coal Co., 242 U. S. 120, 37 S. Ct. 46, 61 L. Ed. 188, the coal company sued to recover damages from the railroad on the ground that the latter had failed to supply a sufficient number of cars and had discriminated against it unjustly. It was found that con-

ditions of traffic were normal and that the railroad had plenty of cars for the coal company if it chose to supply them. In these circumstances there was no administrative question to be passed upon. The court emphasized the fact that section 22 of the Interstate Commerce Act (49 U. S. C. A. § 22) preserved such "appropriate common law or statutory remedies" as could be enforced consistently with the purpose of the act, that no administrative question was presented, and held that the claim might therefore be prosecuted without any precedent action by the Commission. In Great Northern Ry. v. Merchants' Elev. Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943, where the question whether a tariff established by the Commission covered a certain product involved no matters of fact as it did in Tex. & Pac. Ry. Co. v. American Tie Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255, but only a construction of the meaning of the word "lumber" in the tariff, a suit by a shipper to recover alleged overcharges by the railroad was sanctioned without preliminary resort to the Commission. In Tex. & Pac. Ry. v. Gulf, etc., Ry., 270 U. S. 266, 46 S. Ct. 263, 70 L. Ed. 578, a direct judicial remedy was sanctioned under paragraph 20 of section 402 of the Transportation Act of 1920, 49 U. S. C. A. § 1 (20). In Turner Lumber [fol. 104] Co. v. C., M. & St. Paul Ry., 271 U. S. 259, 46 S. Ct. 530, 70 L. Ed. 934, the question whether the Commission had violated the Constitution in fixing so-called penalties for demurrage of cars was held properly determinable by a court without prior resort to the Commission, since it involved the jurisdiction of that body and its right to proceed at all.

It seems evident that the Supreme Court, after first holding in the Abilene Case, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, that prior resort to the Commission must be had where uniformity of rates is affected by the decision of a question of fact, has proceeded far beyond the natural limitations of such a doctrine, and has, in general, insisted upon prior resort to the Commission wherever complicated questions of fact will arise and experience in technical matters is required. Thus in Midland Valley R. R. v. Barkley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664, the carrier's practice of distributing coal cars was involved. Though the question was not one of discrimination or of rates, but of the reasonableness of the practice,

yet prior resort to the Commission was held to be necessary. So in Northern Pac. Ry. v. Solum, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221, it was specifically contended that the rule which requires preliminary determination of questions by the Commission applied only to cases where a particular rate was unreasonable or a particular practice was discriminatory, but the court said, at page 483 of 247 U. S., 38 S. Ct. 550, 553: "It applies, likewise, to any practice of the carrier which gives rise to the application of a rate." In Board v. Great Northern Ry. Co., 281 U. S. 412, 50 S. Ct. 391, 393, 74 L. Ed. 936, where a commission of the state of North Dakota had made an order prescribing intrastate class rates and reducing the existing rates about 10 per cent., a suit was brought by the carriers against the state commission to enjoin enforcement of its order pending the determination by the Interstate Commerce Commission of the question whether the intrastate rates would cause unreasonable discrimination against interstate commerce. In discussing the powers of the Interstate Commerce Commission, the court said: "The controlling principle, * * * was derived from a consideration of the nature of the question and of the inquiry and action required for its solution. The inquiry would necessarily relate to technical and intricate matters of fact, and the solution of the question would demand the exercise of sound administrative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend." It was held that the federal court had no authority to enjoin the enforcement of the state order pending the determination by the Interstate Commerce Commission of the question whether the intrastate rates unduly affected interstate commerce. The question was primarily not one of discrimination, for within the state of North Dakota there would have been no discrimination. It was really whether the rates so affected interstate business as to be unreasonable under all the circumstances.

It seems evident under the most recent interpretation of the Interstate Commerce Act that questions of reasonable-

ness and of fact affecting land carriers must first be raised before the Interstate Commerce Commission. The Sherman Act as now construed only prevents unreasonable restraints of trade. Standard Oil Co. v. United States, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; Am. Tob. Co. v. United States, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663; National Ass'n of Window Glass Mf'rs v. United States, 263 U. S. 403, 44 S. Ct. 148, 68 L. Ed. 358. Therefore, even had the agreement set forth in the present bill related to land carriers, it would have had to be passed upon by the Interstate Commerce Commission before resort to the courts. In Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 49, 67 L. Ed. 183, it was observed that damages for the exaction of rates which the Commission had found to be illegal because unreasonably high or discriminatory would be recovered in proceedings before the Commission, and that it could not be supposed that Congress had intended to provide the shipper "with an additional remedy under the Anti-Trust Act." In the opinion in the Keogh Case it was further observed that a combination of carriers to fix nondiscriminatory rates might still be illegal under the Anti-Trust Acts and the government might have redress by criminal proceedings under section 3 (15 U. S. C. A. § 3), [fol. 105] by injunction under section 4 (15 U. S. C. A. § 4) and by forfeiture under section 6 (15 U. S. C. A. § 6); but, while the approval of the rates by the Commission would not bar proceedings by the government, a private shipper who had lost the benefit of rates which except for the conspiracy he would have enjoyed, could not recover damages under section 7 of the Sherman Act (15 U. S. C. A. § 15).

The decisions that the Sherman Act can be invoked by the government against combinations involving the fixing of rates by land carriers can therefore have no application to original suits by private parties, whether brought under section 7 of that act or otherwise. Actions at law under section 7 are barred by no statutory proscription such as section 16 of the Clayton Act (15 U. S. C. A. § 26), which forbids injunctive relief in respect to matters "subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission," but because the remedies affected by the Interstate Commerce Act are exclusive.

Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183; Central Stock Yards Co. v. Louisville & N. R. Co. (C. C.) 112 F. 823; Cohen v. Schofield, 299 Pa. 496, 149 A. 710.

The trial judge said in his opinion: "The means alleged to have been employed were unreasonably excessive differentials between contract rates and open or tariff rates, coupled with viciously discriminatory practices in applying the differentials. Shippers, in a variety of ways, were thereby coerced, it is said, to divert general cargo from the line of the plaintiff to the lines of the defendants. Without a scale of unreasonably high tariff rates or unreasonably low contract rates, the differentials could not have existed as a device."

If, as we believe, the foregoing analysis of the charges in the amended bill is correct, the gravamen of the cause of action in the case at bar was the unreasonableness of the agreed rates of carriage, which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission.

But a reason, other than the analogy of the rule, starting with the Abilene Case, that administrative questions must first be submitted to the Interstate Commerce Commission, required the decision of the court below. That rule was originated by the Supreme Court, and has been extended in scope in spite of section 22 of the Interstate Commerce Act (49 U. S. C. A. § 22), prescribing that nothing contained therein should "in any way abridge or alter the remedies * * * existing at common law or by statute, but the provisions of this act are in addition to such remedies." The Shipping Act, on the other hand, contains no clause preserving general legal and equitable remedies, but provides ample remedies of its own. It empowers the Shipping Board under section 15 (46 U. S. C. A. § 814) to approve such agreements as it shall not find to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this Act. * * *" The act broadly forbids only contracts that are "unfair or unjustly discriminatory" (section 14 [46 U. S. C. A. § 812]), and the giving of "any

undue or unreasonable preference or advantage'' (section 16 [46 U. S. C. A. § 815]). It thus seems evident that Congress has set up a standard for the shipping business quite different from that applicable to trade agreements affecting business on land. Approval under section 15, supra, does not depend on whether a trade agreement fixes rates or restricts competition, but on whether it injures the welfare of the industry. The determination of whether an agreement fixing rates is for the benefit of the industry or is an unreasonable and oppressive burden which cannot be justified requires a special fact finding tribunal having an intimate acquaintance with the needs and practices of the business and constant experience in resolving the merits of conflicting interests in a vast and complicated industry. We have no doubt that the questions arising in this case should be passed upon by the Shipping Board, and that the Shipping Act created a tribunal adapted to exercise this precise function.

The most important objection to the conclusion of the trial court that the jurisdiction of the Shipping Board is primary and exclusive is due to the provision of section 15 (46 U. S. C. A. § 814) of the Shipping Act that agreements made after the organization of the Shipping Board ''shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement. * * *'' While section 15 [fol. 106] excepts from the operation of the Sherman Act, and acts supplementary thereto, agreements ''lawful under this section,'' it excepts none other, and, as the agreement set forth in the amended bill is alleged not to have been approved by the Board, it is ex vi termini unlawful.

It is said that the foregoing clause leaves a private suitor free to seek an injunctive remedy under the Clayton Act so long as the agreement has not been filed and approved. Doubtless the government would have such a right, but it does not follow that the right inheres in private persons. The Shipping Act provides complete remedies for all the alleged wrongs, and, in the absence of investigation by the Shipping Board, it is impossible to say whether there is a substantial grievance. The exception as to ''approved'' agreements seems to have been inserted in the act in order

to make it clear that some agreements may be sanctioned by the Shipping Board which would offend the Anti-Trust Acts, rather than for the purpose of retaining remedies which under the Interstate Commerce Act (49 U. S. C. A. § 1 et seq.) and Packers & Stockyards Act (7 U. S. C. A. § 181 et seq.) have been held to be superseded by remedies afforded by those acts. Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183; Sullivan v. Union Stockyards Co. (C. C. A.) 26 F. (2d) 60.

Section 15 of the Shipping Act (46 U. S. C. A. § 814) provides that every carrier by water "shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier * * * to which it may be a party * * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement. * * *" The Board shall approve such agreements as it does not find "to be unjustly discriminatory or unfair." Section 14 (46 U. S. C. A. § 812) prohibits agreements to allow "deferred rebate" and likewise prohibits "unfair or unjustly discriminatory" contracts with shippers "based on the volume of freight offered." Section 16 (46 U. S. C. A. § 815) provides that it shall be unlawful for any common carrier "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 17 (46 U. S. C. A. § 816) prohibits carriers by water from demanding any rate that is "unjustly discriminatory" and authorizes the Board to make orders to discontinue charging such rates.

It appears from the foregoing that the failure to secure the approval of such an agreement as is alleged, the granting of deferred rebates, the alleged spreading of false rumors about the business of the plaintiff, and the persuasion of shippers to cancel existing contracts with it, are all

forbidden by the Shipping Act, and come either within its express prohibitions or within the general language of section 16 (46 U. S. C. A. § 815), which makes it unlawful "to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 17 (46 U. S. C. A. § 816) specifically authorizes the Board to order that a carrier discontinue "unjustly discriminatory or prejudicial rate." Section 22 (46 U. S. C. A. § 821) allows "any person" to file with the Board a complaint setting forth "any violation of the Act" by a common carrier by water and asking reparation for the injury, if any, caused thereby. It provides that the Board shall "investigate it in such manner and by such means, and make such order as it deems proper."

The words of section 22 (46 U. S. C. A. § 821) authorizing the Board upon complaint and investigation to "make such order as it deems proper" and to "direct the payment * * * of full reparation," and the words of section 17 (46 U. S. C. A. § 816) authorizing the Board to make an order that the carrier shall discontinue charging any "unjustly discriminatory or prejudicial rate, fare, or charge," afford ample remedies for all the wrongs recited in the amended bill. Section 29 (46 U. S. C. A. § 828) covers the enforcement of orders of the Board against recalcitrant persons and provides that any party injured by the violation of an order "may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other [fol. 107] proper process, mandatory or otherwise." Section 31 (46 U. S. C. A. § 830) makes the judicial procedure in regard to orders of the Interstate Commerce Commission applicable to orders of the Shipping Board.

We believe we have shown that, where a tribunal like the Shipping Board has been created with supervisory powers over a business and with peculiar facilities for dealing with complicated questions of administration and economics, the remedies afforded under the act creating it ought to be exhausted before recourse may be had to the courts.

The Shipping Board may determine whether any agreement such as is described in the bill has actually been made,

and, if it has, may order it filed and require the parties to cease from acting under it unless and until it is approved. Under section 22 of the act (46 U. S. C. A. § 821) the Board may award reparation to the plaintiff for any wrongs it has suffered because of practices forbidden by sections 14 and 16 and under section 17 (46 U. S. C. A. § 816) may require the defendants to discontinue any unjustly discriminatory rates. Proof of the existence and extent of the grievances complained of will require investigations in a special field demanding expert knowledge. The alternative to proceeding before the Board seems appalling. In every case where complaints like the present are made by private persons, it would be necessary for a court to enter upon the trial of an anti-trust suit in order to determine whether the alleged illegal combination and practices exist and at any moment to become substantially ousted of jurisdiction by the filing of the agreement (if shown to have been entered into), with a resultant reference to the Shipping Board of the question as to how far it should be canceled, modified, or approved. It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as other relief might be had, and still harder to imagine that these remedies might be pursued pari passu. If suits for violations of the Anti-Trust Acts cannot be brought either at law or in equity against land carriers, though the Interstate Commerce Act has in terms preserved judicial remedies, it is hard to see why they may be brought against ocean carriers, where the Shipping Act contains no such reservation and has provided for the approval of agreements which, at least so far as the parties are concerned, may not accord with the requirements of the Anti-Trust Acts.

No doubt, if the allegations in the amended bill are found to be correct, the Anti-Trust Acts have been violated, but the Shipping Act has been violated as well. Though the remedies under the Anti-Trust Acts are thought by plaintiff's counsel to apply, it does not follow that they do, where the frame of the Shipping Act indicates another procedure. We find that all the wrongs alleged are violations of the Shipping Act, and hold that the plaintiff must seek its remedy thereunder.

It is said that the present suit ought to lie because the Shipping Board has already held in the proceeding of Eden

Mining Co. v. Bluefields Fruit & Steamship Co., 1 U. S. S. B. 41, that exclusive contracts similar to those set forth in the amended bill are unlawful. It is true that certain decisions under the Interstate Commerce Act to some extent support this reasoning. Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472; National Pole Co. v. Chicago & N. W. Ry. Co. (C. C. A.) 211 F. 65. But the Interstate Commerce Act preserved legal and equitable remedies, whereas the Shipping Act contains no such reservations, and prior resort should be had to it as to all matters within its jurisdiction Moreover, without having a burdensome trial, it is impossible to know whether the situations in the Eden proceeding and the present suit are parallel. Certainly they are prima facie much less comparable than cases relating to rates of transportation for identical services, where in one of them the rate-making function has already been exercised, as in Mitchell Coal Co. v. Penna. R. R., supra. The difficulty with treating a single decision of the Shipping Board as a binding precedent, where it deals with a rate agreement involving complicated and difficult questions of law and fact, may be appreciated by examining the opinion of Judge Lacombe in United States v. Prince Line (D. C.) 220 F. 230, in which the three other Circuit Judges of this circuit concurred. It held that an extensive combination of steamship companies, which had agreed upon rates, restricted competition, and even granted rebates, was not so far repugnant to the "rule of reason" that it violated the Sherman Act. Irrespective of the legal merits of that decision as a precedent for the construction of the Sherman Act, it certainly indicates how [fol. 108] slight a basis the interpretation of a single trade agreement furnishes for settling the law relating to other combinations. Especially is this so ever since the creation of the Shipping Board and the delegation to it of broad powers to approve trade agreements which will benefit the shipping business as a whole.

It may possibly be suggested that the facts set forth in the amended bill have been admitted on demurrer and that consequently no administrative questions are left for determination by the Shipping Board. But the Shipping Act, as we have already said, does not provide that nothing contained therein "shall in any way abridge or alter the

remedies * * * existing at common law or by statute," and, by its own terms, empowers the Board to "make such order as it deems proper" to remedy private wrongs and also empowers any injured person to apply to the courts for enforcement of orders of the Board which are not obeyed. Not only, therefore, may the Board consider and determine questions of law as well as of fact affecting matters within its jurisdiction, but admissions taken to be made because of the motion to dismiss, which was founded primarily on the objection that the plaintiff had no right to apply for an injunction in advance of resort to the Shipping Board, cannot justify the continuance of the present suit. It is notorious that such charges as are made here are not disposed of by admissions, but in the end result in protracted trials and in the resolution of complicated problems and disputed questions of fact and economics. A choice must be made between the two possible remedies of a suit under the Anti-Trust Acts and a proceeding before the Shipping Board. Every practical consideration favors resort to a tribunal specially equipped and experienced to deal with such matters. The Shipping Board seems to have been designed to aid the courts and to relieve them by its investigation and preliminary determination. We think that every reason of policy and convenience should prompt the courts to "take arms against a sea of troubles" by requiring resort to the Shipping Board in situations like the present. That tribunal has exclusive jurisdiction here, because of the nature of the questions involved and the broad powers given to it under the act.

It is argued that private suits for violation of the anti-trust statutes ought to lie by the analogy of the decisions under the Federal Trade Commission Act (15 U. S. C. A. §§ 41-51). But that act not only in terms preserves remedies under the Anti-Trust Acts, as the Shipping Act does not, but, under the ruling of the Supreme Court, is held not to afford private persons an administrative remedy. The analogy therefore fails. Federal Trade Comm. v. Klesner, 280 U. S. 19, 50 S. Ct. 1, 74 L. Ed. 138, 68 A. L. R. 838.

It seems clear that any disposition of this suit other than that by the court below would not only add enormously to judicial labors, but would hopelessly complicate the situa-

tion we have before us by applying two separate and in some respects inconsistent remedies to transactions already difficult enough in themselves. We hold that the analogy of the decisions under the Interstate Commerce Act is complete, and that the broad powers given by the Shipping Act furnish added reasons for denying injunctive relief.

The decree is affirmed.

Swan, Circuit Judge, dissents, with opinion.

[fol. 109] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1930

No. 5

Argued October 22, 1930. Decided May 18, 1931

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff-Appellant,

v.

THE CUNARD STEAMSHIP COMPANY, Ltd., OCEANIC STEAM NAVIGATION COMPANY, Ltd., FURNESS WITHY & COMPANY, Ltd., Atlantic Transport Company, Ltd., Anchor Line (Henderson Bros.), Ltd., Bristol City Line of Steamers, Ltd., Canadian Pacific Steamships, Ltd., Donaldson Bros., Ltd., Ellerman's Wilson Line, Ltd., G. Heyn & Sons, Ltd., P. Leyland & Company, Ltd., Manchester Liners, Ltd., Cairn Line of Steamships, Ltd., Franklin A. Ryan and James Sinclair, Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

DISSENTING OPINION

SWAN, Circuit Judge (dissenting):

I am not convinced that the Shipping Act (46 U. S. C. A. § 801 et sec.) should be construed to oust the courts of

jurisdiction to issue an injunction under the circumstances here disclosed. The agreement under which the carriers acted and are threatening to act to plaintiff's prejudice has not been filed with and approved by the Board. Hence the acts done under it are forbidden by the Shipping Act as well as by the Sherman Anti-Trust Act (15 U. S. C. A. §§ 1-7, 15). Concededly, on the facts alleged, the plaintiff should have an injunction unless this remedy has been taken away from him because similar relief may be obtained from the Shipping Board. The act does not expressly repeal existing rights and remedies, and repeals by implication are not favored. An injunction forbidding the carriers from acting under the agreement unless and until they shall file it and obtain the Board's approval of it would in no way hamper the Board's administrative functions; indeed, under the allegations of the complaint (admitted by the demurrer), the Board could not legally approve the agreement, nor can I see that such an injunction would be inconsistent with the rights and remedies given the plaintiff by the Shipping Act. The attempt to apply the principle that repeals by implication are not favored leads me to the belief that the similar injunctive relief which I have assumed the plaintiff might obtain from the Board, though the language of the act does not seem to be so clear as to put the matter entirely beyond question, should be considered an additional remedy, not a remedy in substitution for that which the plaintiff might seek in the courts. While the construction placed by the Supreme Court on the Act to Regulate Commerce in such cases as Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183, and Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, tends to support the view taken by my colleagues, [fol. 110] I do not regard the decisions as controlling of the present problem. In the Keogh Case the rates complained of as violating plaintiff's rights had been approved by the Interstate Commerce Commission, and in the Abilene Case the tariff schedule had been duly filed and published and not found unreasonable by the Commission. In the case at bar, however, the agreement complained of has not been, and cannot legally be, approved by the Shipping Board. I think the decree should be reversed.

[fol. 111] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the City of New York, on the 25th day of May, one thousand nine hundred and thirty-one.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

UNITED STATES NAVIGATION COMPANY, INC., Plaintiff-Appellant,

v.

CUNARD STEAMSHIP COMPANY, LTD., et al., Defendants-Appellees

DECREE—Filed May 23, 1931

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 112] [File endorsement omitted.]

[fol. 113] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 114] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36110. U. S. Circuit Court of Appeals, Second Circuit. Term No. 296. United States Navigation Company, Inc., Petitioner, vs. The Cunard Steamship Company, Ltd., et al. Petition for writ of certiorari and exhibit thereto. Filed August 14, 1931. File No. 36110.